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In the

Supreme Court of the United States

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA; BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION; CALIFORNIA BUILDING INDUSTRY ASSOCIATION; and GREENHORN GRANGE,
Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF INTERIOR; DIRK KEMPTHORNE, in his official capacity as Secretary of Interior; H. DALE HALL, in his official capacity as Director of the United States Fish and Wildlife Service; MATTHEW J. HOGAN, in his official capacity as Acting Director of United States Fish and Wildlife Service,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After or concurrent with the listing of a species as "threatened" or "endangered," the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, mandates that "critical habitat" be designated for a protected species *only* "after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). Any area may be excluded from "critical habitat" if the benefits of exclusion outweigh the benefits of inclusion, unless the exclusion would result in the extinction of the species. *Id.*

The United States Fish and Wildlife Service advocates a "baseline" approach to the "critical habitat" economic impacts analysis. This approach accounts only for the impacts that would not occur "but for" the "critical habitat" designation itself. The analysis ignores the co-extensive economic impacts caused by listing and by other statutes. In *New Mexico Cattle Growers Association v. United States Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), the Tenth Circuit invalidated the "baseline" approach (because it invariably understated overall impacts) and held that a "critical habitat" economic analysis must take into account *all* impacts attributable to the "critical habitat" designation, even if those impacts can also be attributed to other causes.

In this case, however, and in *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (petition for certiorari pending, No. 10-454), the Ninth Circuit rejected *New Mexico Cattle Growers* and held that the analysis need only take into account those impacts *solely* attributable to the designation, and may ignore any and all cumulative economic impacts.

The question presented is:

Under Section 4 of the ESA, must the government analyze all of the economic impacts of "critical habitat" designation (regardless of whether the impacts are co-extensive with, or cumulative of, other causes), as the Tenth Circuit decided, or instead only those impacts for which "critical habitat" designation is a "but for" cause, as the Ninth Circuit decided?

LIST OF ALL PARTIES

Petitioners: Home Builders Association of Northern California; Building Industry Legal Defense Foundation; California Building Industry Association; and Greenhorn Grange.

Respondents: United States Fish and Wildlife Service; United States Department of Interior; Dirk Kempthorne, in his official capacity as Secretary of Interior; H. Dale Hall, in his official capacity as Director of the United States Fish and Wildlife Service; Matthew J. Hogan, in his official capacity as Acting Director of United States Fish and Wildlife Service.

Intervenors: Butte Environmental Counsel; California Native Plant Society; and Defenders of Wildlife.

CORPORATE DISCLOSURE STATEMENT

Home Builders Association of Northern California,[1] Building Industry Legal Defense Foundation, California Building Industry Association, and Greenhorn Grange hereby state that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

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[1] During the pendency of the appeal below, Petitioner Home Builders changed its name to the Building Industry Association of the Bay Area. The former name is retained here for the sake of consistency and clarity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Home Builders Association of Northern California, Building Industry Legal Defense Foundation, California Building Industry Association, and Greenhorn Grange respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 616 F.3d 983 (9th Cir. 2010), and included in Petitioner's Appendix (Pet. App.) at A. The opinion of the district court granting and denying the motions for summary judgment is not published but is included in Pet. App. at C. The opinion of the district court granting in part the motions for clarification, reconsideration, or amendment is not published but is included in Pet. App. at D.

JURISDICTION

On November 1, 2006, the district court denied Petitioners' motion for summary judgment and granted the cross-motions for summary judgment of Respondents United States Fish and Wildlife Service, *et al.*, upholding the Service's designation of "critical habitat" for 15 vernal pool species under the Endangered Species Act, 16 U.S.C. §§ 1531-1544. On January 23, 2007, the district court granted in part the motions for clarification, reconsideration, or amendment, and remanded the designation to the

Service. On May 31, 2007, the Service completed the remand without substantive change to the designation. Following entry of judgment, *see* Pet. App. at B, Petitioners appealed to the Ninth Circuit Court of Appeals. On August 9, 2010, that court issued its decision affirming the judgment of the district court in full. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE[2]

The Endangered Species Act (ESA) provides in pertinent part:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as

[2] The provision of the ESA most pertinent to this Petition is set forth above. Other relevant ESA provisions are reproduced at Pet. App. at E & F.

> critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

INTRODUCTION

The issue raised by this petition is whether the United States Fish and Wildlife Service can flout Congress' command that the Service take account of the full economic impact of its actions under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, by putting on blinders and ignoring the real-world effects of its regulations. Here, the Service has designated hundreds of thousands of acres of "critical habitat" for fifteen ESA-protected species, *see* 70 Fed. Reg. 46,924 (Aug. 11, 2005), while grossly underestimating the economic impact of the designation through its failure to consider the designation's cumulative economic impact. The Ninth Circuit Court of Appeals' decision authorizes the Service in this and other designations to assess the economic impact of "critical habitat" designation by looking *only* at the cost of the designation itself, in a vacuum, with *no* regard for the cumulative impact of that cost. *See* Pet. App. at A-18–A-20.

The Ninth Circuit's approval of this truncated analysis conflicts with a decision of the Tenth Circuit Court of Appeals. *Compare id.* at A-20 *with N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284-85 (10th Cir. 2001). Also, the Service likely will "nationalize" the approach approved by the Ninth Circuit, just as the agency has done with other ESA splits between the Ninth and Tenth Circuits. *See infra* Part II.A. Even standing alone, the Ninth Circuit's decision will govern millions of acres of

"critical habitat" throughout the West. *See infra* Part II.B. And, the decision promises to have an especially harsh impact on housing and other land development industries already suffering in these tough economic times. *See infra* Part II.C. For these reasons, more fully explained below, the writ should be granted.

STATEMENT OF THE CASE

"Critical Habitat" and the Endangered Species Act

To be protected under the ESA, a species must be designated as either "endangered" or "threatened." 16 U.S.C. § 1533(a) (imposing duty to list "endangered" and "threatened" species). *See id.* §§ 1532(6) & (20) (defining "endangered" and "threatened" species). Section 9 of the ESA forbids the taking of a listed species.[3] *Id.* 16 U.S.C. § 1538(a)(1)(B). A "take" may include "significant habitat modification." 50 C.F.R. § 17.3(c)(3).

The Service must, concurrent with listing, designate an endangered or threatened species' "critical habitat" "to the maximum extent prudent and determinable." *Id.* 16 U.S.C. § 1533(a)(3). "Critical habitat" is defined in part as "the specific areas . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." *Id.* § 1532(5)(A)(i). The Service may designate "critical habitat" only "after

[3] Although Section 9 applies only to endangered species, the Service has adopted a rule, pursuant to authority under Section 4(c) of the ESA, 16 U.S.C. § 1533(c), that makes illegal the take of a threatened species. 50 C.F.R. § 17.31.

taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). The Service may exclude any area from "critical habitat" if the benefits of exclusion outweigh the benefits of inclusion, provided that the exclusion would not result in the extinction of the species. *Id.*

The Petitioners' Lawsuit

Petitioners are a collection of trade organizations representing the homebuilding, livestock grazing, and agricultural industries in California. In 2005, Petitioners filed suit in the Eastern District of California challenging the Service's designation of "critical habitat" for 15 ESA-protected species[4] found within "vernal pools."[5] Petitioners contended that the designation was inconsistent in several ways with the statutory definition for "critical habitat," including the requirement that "critical habitat" be designated only

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[4] The 15 species comprise four crustaceans—the Conservancy fairy shrimp, Longhorn fairy shrimp, Vernal pool fairy shrimp, and Vernal pool tadpole shrimp—and eleven plants—Butte County meadowfoam, Contra Costa goldfields, Hoover's spurge, Fleshy owl's-clover, Colusa grass, Greene's tuctoria, Hairy Orcutt grass, Sacramento Orcutt grass, San Joaquin Valley Orcutt grass, Slender Orcutt grass, and Solano grass. *See* 70 Fed. Reg. at 46,925.

[5] Vernal pools are a type of ephemeral wetland. 68 Fed. Reg. 46,684, 46,685 (Aug. 6, 2003). Vernal pools typically are found in grasslands, and are fed hydrologically by swales and associated uplands, which themselves are often seasonal wetlands. *Id.* Vernal pools attain their typical "ponding" through a perched water table consisting of impervious or nearly impervious soils. 70 Fed. Reg. at 46,925. Most vernal pool nutrients are derived from detritus, *i.e.*, dead organic matter, that is carried into the pools by water flows, animals, or humans. 68 Fed. Reg. at 46,685-86.

after a comprehensive economic impacts analysis of the designation has been completed. Specifically, Petitioners contended that the Service's failure properly to assess the *cumulative* economic impact of the designation violated the Service's obligation to "tak[e] into consideration the [designation's] economic impact." *See id.* § 1533(b)(2). Although the Service produced an economic impacts analysis for the designation, the Service took into consideration only the *incremental* impact of the designation and did not consider the designation's incremental impact *in combination with* existing economic impacts attributable to other federal, state, and local land-use laws. The district court ultimately ruled for the Service, and did not specifically address Petitioners' cumulative economic impacts argument. *Cf.* Pet. App. at C-47–C-54.

On appeal, Petitioners renewed their arguments against the "critical habitat" designation, including their challenge to the Service's failure to consider the designation's cumulative economic impacts. The Ninth Circuit, however, affirmed the district court's decision in full. Pet. App. at A-20. With respect to Petitioners' cumulative economic impacts argument, the panel held that the argument was foreclosed by *Arizona Cattle Growers*, *id.*, which itself conflicts with the Tenth Circuit. Accordingly, the panel held that the Service has no obligation to consider cumulative economic impacts when designating "critical habitat." *Id.* The panel thereby confirmed and exacerbated a conflict between circuits.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN CIRCUITS OVER WHETHER THE GOVERNMENT MUST CONSIDER THE CUMULATIVE ECONOMIC IMPACTS OF "CRITICAL HABITAT" DESIGNATIONS

In ruling that the Service is required to conduct a cumulative economic impacts analysis when designating "critical habitat," the Ninth Circuit panel, relying on *Arizona Cattle Growers*, diverged from the Tenth Circuit's decision in *New Mexico Cattle Growers*.

In *New Mexico Cattle Growers*, the Tenth Circuit addressed the issue of whether the Service, when conducting a "critical habitat" economic impacts analysis, must take into account all the impacts attributable to the designation, or instead only those impacts that are *solely* attributable to designation. Prior to the Tenth Circuit's decision, the Service routinely excluded from consideration those impacts attributable to designation but also attributable to some other cause. *See* 248 F.3d at 1283. This approach became known as the "baseline" analysis, because it purported to assess only the incremental difference between a world with the designation and a world without the designation. *Id.* The problem with this baseline approach, as argued in *New Mexico Cattle Growers*, was that it routinely resulted in economic analyses that ascribed *zero* economic impact to

designations.[6] *See id.* at 1283-84. For, at that time, the Service took the position that designation provided few if any protections that were not already provided by other ESA provisions, primarily the listing provision.[7] *See id.* at 1283. Thus, the Service reasoned, the economic impact from the designation was virtually nonexistent. *See id.* at 1283-84.

The Tenth Circuit rejected the Service's approach, concluding that it would entirely undercut the ESA's requirement that the Service first assess the designation's economic impacts before imposing "critical habitat" restrictions on any area. *See id.* at 1285. The court therefore prescribed a new method to "critical habitat" economic analyses. Specifically, the court adopted a cumulative approach, whereby the Service must take into account *all* economic impacts attributable to the designation, even those impacts that are "co-extensive" with other causes, such as the listing of a species. *See id.* at 1284-85.

Since *New Mexico Cattle Growers*, no circuit court had addressed the "baseline" versus "co-extensive"

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[6] The *New Mexico Cattle Growers* petitioners' interest was far more than academic. For example, in discussing the petitioners' standing to sue, the Tenth Circuit observed that cattlemen had to fence off "critical habitat" rivers to prevent livestock from wading into them, a practice that produced significant inconvenience and financial harm. *See New Mexico Cattle Growers*, 248 F.3d at 1284 n.3.

[7] The Ninth Circuit subsequently overturned the Service's minimalist interpretation of critical habitat protections in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004), which held that those protections are intended not just to stave off extinction (as the Service had contended), but also to promote a species' recovery and delisting.

debate until this year,[8] when the Ninth Circuit, in *Arizona Cattle Growers*, diverged from the Tenth Circuit to hold that the ESA does not require the co-extensive approach, and that the Service's previous baseline approach is permissible. *See* 606 F.3d 1160, 1173-74 (9th Cir. 2010). The *Arizona Cattle Growers* panel reached that conclusion in part based on the Service's post-*New Mexico Cattle Growers* shift in interpreting the nature and scope of the protections afforded by "critical habitat." Specifically, the Ninth Circuit noted that the Service now, in contrast to the *New Mexico Cattle Growers* era, interprets "critical habitat" as adding another layer of regulation separate and distinct from other ESA provisions. *See id.* at 1173. Consequently, because it is possible now for the Service to produce a baseline "critical habitat" analysis that does not come out to *zero*, the Service can properly use the baseline approach without undercutting its statutory obligation to assess the economic impact of proposed "critical habitat." But the Service's shift in approach was nominal at best, and still in conflict with *New Mexico Cattle Growers*.

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[8] Two district courts have rejected the *New Mexico Cattle Growers* approach. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1151-53 (N.D. Cal. 2006); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 129-30 (D.D.C. 2004). One district court has determined that the Service's adoption of the baseline approach is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Otay Mesa Prop. L.P. v. U.S. Dep't of Interior*, No. 08-383 (RMC), 2010 U.S. Dist. LEXIS 52233, at *39-*40 (D.D.C. May 27, 2010), *appeal pending*, No. 10-5204 (D.C. Cir. June 22, 2010.

Relying expressly on *Arizona Cattle Growers*, the panel below rejected Petitioners' challenge to the Service's failure to conduct a full cumulative impacts analysis of the vernal pool species' "critical habitat."

> Home Builders's position is contrary to *Arizona Cattle Growers*, where the court rejected the notion that "FWS was required to attribute to the critical habitat designation economic burdens that would exist even in the absence of that designation." That opinion also expressly approved the baseline approach to economic analysis, under which "any economic impacts of protecting the [listed species] that will occur regardless of the critical habitat designation . . . are treated as part of the regulatory 'baseline' and are not factored into the economic analysis of the effects of the critical habitat designation."

Pet. App. at A-20 (quoting *Arizona Cattle Growers*, 606 F.3d at 1172) (citation omitted)). Thus, the panel confirmed the conflict between the Ninth and Tenth Circuits on the statutorily required economic impacts analysis of "critical habitat" designations.

Moreover, the panel likely exacerbated the existing conflict by extending *Arizona Cattle Growers* to preclude the assessment of co-extensive, or cumulative, economic impacts beyond the listing. In *Arizona Cattle Growers*, the appellants did not argue that the Service must take into account the non-ESA-related costs of existing federal, state, and local land use controls. *Cf.* 606 F.3d at 1172. Rather, the appellants simply argued that the Service must take into account the co-extensive economic impacts that

are fairly attributable to the designation itself as well as to listing. *See id.* In contrast, Petitioners in this case argue that the Service cannot know the true impact of "critical habitat" designation unless and until it assesses the incremental impact of such designation *in combination with* the economic regulatory baseline. Below, the panel rejected that argument, concluding that it is enough for the Service to assess a designation's incremental impact (using the baseline method), without giving any heed to how that impact, when added to existing land-use controls, might affect a community.[9] *See* Pet. App. at A-18–A-20. The panel's rejection of the cumulative impacts assessment obligation heightens the conflict between the Ninth and Tenth Circuits, a conflict that encompasses a sizable portion of the nation's land mass. This Court's review is required to resolve the conflict.

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[9] The panel observed in a footnote that the vernal pool species' economic analysis *did* "include consideration of compliance with other regulations." Pet. App. at A-19 n.6. The panel misunderstood either Petitioners' argument or the Service's economic analysis. To be sure, that analysis assessed the impacts of other land-use controls, but only to exclude those impacts from consideration as part of the regulatory baseline. The Service used that baseline to assess the separate *incremental impact* of the critical habitat designation. *See* Pet. App. at G (discussing federal, state, and local land-use laws as part of the "baseline burden"). The government never undertook the *cumulative* analysis (*i.e.*, baseline + incremental effect) that the ESA requires.

II

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION WILL HAVE A SIGNIFICANT NATIONWIDE IMPACT

The panel's decision below allows the Service largely to ignore the economic impacts of designating "critical habitat." The purpose of the ESA's economic impacts assessment obligation, revealed by the statute's plain meaning, is twofold: (1) to make sure that the Service is aware of the economic consequences of its actions; and (2) to provide the Service with the information necessary to determine whether areas should be excluded from designation on the grounds of excessive economic impacts. *See* 16 U.S.C. § 1533(b)(2). *Cf. Bennett v. Spear*, 520 U.S. 154, 176-77 (1997) (noting that one ESA objective "is to avoid needless economic dislocation" and that "economic consequences are an explicit concern of the Act"). The panel's decision frustrates these purposes and promises to have a significant negative effect on land use throughout the nation and in the West especially.

A. The Panel's Decision Will Be "Nationalized"

The Service will likely use the Ninth Circuit's decision as authority to adopt the defective baseline approach—and to ignore cumulative impacts—for *all* "critical habitat" designations outside of the Tenth Circuit. The Service has taken precisely such a nationalized approach with respect to an existing Ninth and Tenth Circuit split concerning the interplay of ESA "critical habitat" designations and the requirements of the National Environmental Policy Act

(NEPA), 42 U.S.C. § 4321, *et seq.* In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit held that NEPA does not apply to "critical habitat" designations. In *Catron County Board of Commissioners v. United States Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), the Tenth Circuit held that NEPA *does* apply to "critical habitat" designations. The Service, however, has opted to do no NEPA analysis for "critical habitat" designations outside of the Tenth Circuit. *See, e.g.*, 70 Fed. Reg. at 46,955 ("It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act . . . . This assertion was upheld in the courts of the Ninth Circuit."). There is every reason to believe that the Service will, in the same manner, "nationalize" the Ninth Circuit's decision below.

B. The Panel's Decision Will Have a Broad Effect Within the Ninth Circuit

The panel's decision will have broad application just within the Ninth Circuit, where the geographic jurisdiction includes over 900 listed species, of which 162 have designated "critical habitat" covering millions of acres. For example:

- The vernal pools "critical habitat" designation covers over 850,000 acres in California. 70 Fed. Reg. at 46,924.
- The Northern spotted owl designation covers over 5 million acres in Washington, Oregon, and California. 73 Fed. Reg. 47,326, 47,351 (Aug. 13, 2008).

- The Mexican spotted owl designation covers nearly 4 million acres in Arizona. 69 Fed. Reg. 53,182, 53,213 (Aug. 31, 2004).
- The Canada lynx designation covers over 7.6 million acres in Montana, Idaho, and Washington. 74 Fed. Reg. 8616, 8642 (Feb. 25, 2009).[10]
- The California red-legged frog designation covers over 1.6 million acres in California. 75 Fed. Reg. 12,816, 12,816 (Mar. 17, 2010).
- The California gnatcatcher designation covers nearly 200,000 acres of prime land in coastal Southern California. *See* 72 Fed. Reg. 72,010 (Dec. 19, 2007).

Just 6 designations (fewer than 5% of the designations within the Ninth Circuit) cover well over 18 million acres, an area roughly equivalent to the combined land mass of Massachusetts, New Jersey, Connecticut, Delaware, and Rhode Island. The Ninth Circuit's decision will affect millions of acres throughout the West.

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[10] A small portion of the designation in Washington has been vacated by court order. *See Wyo. State Snowmobile Ass'n v. U.S. Fish & Wildlife Serv.*, No. 09-cv-00095-F, 2010 U.S. Dist. LEXIS 102550, at *61 (D. Wyo. Sept. 10, 2010).

C. The Panel's Decision Will Produce Significantly Negative Cumulative Economic Consequences for the Already Languishing Homebuilding Industry

The decision below will have a deep and painful impact on western communities, especially in California, that have been devastated by a perfect storm of economic downturn, budget crises, and draconian environmental regulation. It is not simply that the vernal pools "critical habitat" designation has adverse economic impacts; it is that the designation's negative economic impacts could not possibly have come at a worse time for the homebuilding and related industries. And ironically, it is precisely the adverse effects of these *cumulative* economic impacts that the decision below allows the Service to ignore.

With respect to economic downturn, California naturally suffers now with the rest of the country.[11] But the national economic malaise is exacerbated in California by the lingering effects of the state's just

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[11] *See* State of Emergency—Unemployment Proclamation (Apr. 17, 2009) (proclamation of California Governor Arnold Schwarzenegger noting, *inter alia*, that "many businesses are shutting their doors in this difficult economy, and other employers are laying off workers, eliminating jobs or reducing employee hours and income in an effort to stay in business" and "these conditions are causing a loss of livelihood for hundreds of thousands of people, an inability to provide for families, and increased harm to the communities that depend on them"), *available at* http://gov.ca.gov/proclamation/12041/ (last visited Oct. 19, 2010); Paul Sonne, *Tesco Signals It Will Push Ahead in U.S.*, Wall St. J., Oct. 6, 2010 (observing that in "inland California, . . . the economic downturn has proven particularly severe").

recently resolved budget crisis,[12] as well as by the enforcement of ESA protections for, among other species, the Delta smelt. *See Consol. Delta Smelt Cases*, No. 1:09-cv-00407 OWW DLB, 2010 U.S. Dist. LEXIS 62006, at *148 (E.D. Cal. May 27, 2010) ("[T]he harms [caused by ESA-imposed water shortages] to the affected [California] human communities [are] great."); Garance Burke, *Judge orders California water pumping limits lifted*, Assoc. Press, May 26, 2010 ("The sweeping San Joaquin Valley grows most of the country's fruits and vegetables, but three years of drought and water cutbacks from the state's freshwater estuary have hammered the region, causing drastic job losses and other economic woes."); Mark Grossi, *Valley conservatives focus on water*, Fresno Bee, Apr. 17, 2010, at A10 ("Thousands of Valley farmland acres have been idled due to drought and water cutbacks to protect fish, leaving cities such as Mendota with up to 40% unemployment.").

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[12] Press Release, Cal. Exec. Order S-12-10 (July 28, 2010) (executive order of Governor Schwarzenegger noting a General Fund deficit of $19 billion and the continuing need to enforce furloughs), *available at* http://gov.ca.gov/press-release/15691/ (last visited Oct. 19, 2010). *See Prof. Eng'rs in Cal. Gov't v. Schwarzenegger*, No. S183411, 2010 Cal. LEXIS 9757, at *2-*6 (Oct. 4, 2010) (upholding mandatory furlough program of state employees); *California budget impasse drags on*, CBC News, Sept. 30, 2010 ("California's budget crisis has gone on for more than two years as tax revenues have been hard hit by the economic downturn, resulting in unemployment reaching 12.2 per cent.").

Many of Petitioners' members working in the home building industry have already suffered acutely.[13] To be sure, part of that suffering is attributable to factors separate from environmental regulation in general, or "critical habitat" designation in particular. But with an economy already in the doldrums, it makes little sense to *increase* that economic distress; such an approach violates the commonsense counsel of the "straw that broke the camel's back." According to the panel's decision, the Service is authorized to weigh the piece of straw, yet ignore all the remaining economic "weight" on the camel's back.

That approach promises to have significant economic consequences, for two interrelated reasons. First, environmental regulation imposes real costs. *See* Francis S. Blake, *The Economic Impact of Environmental Regulation*, 5 Nat. Resources & Env't 23, 23 (Summer 1990) (conservatively estimating national annual cost of environmental regulation to be in the range of $80 billion to $100 billion); Holly Doremus, *Private Property Interests, Wildlife Restoration, and Competing Visions of a Western Eden*, 18 J. Land Resources & Envtl. L. 41, 41 (1998)

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[13] *See* State of Emergency—Unemployment Proclamation, *supra* (noting that "Californians have been hit hard by . . . the downturn in the housing market"); Center for Strategic Economic Research, *The Economic Benefits of Housing in California* at i-ii (July 29, 2010), *available at* http://www.strategiceconomicresearch.org/news-0.html (last visited Oct. 19, 2010) (observing in California "a drop in residential permit activity of close to 83 percent between 2005 and 2009," as well as "a considerable decline in the impacts of new housing construction, [through] an approximately 80 percent drop in output and 84 percent decrease in employment").

("Environmental regulation can have heavy financial consequences.").[14]

Second, the ESA, with its "critical habitat" provisions, significantly increases those costs of compliance and mitigation. Indeed, even by the Service's own faulty baseline analysis, the agency anticipates that the economic impact of just two designations—the California gnatcatcher and the California red-legged frog—will exceed *$1 billion* over the next two decades. *See* 72 Fed. Reg. at 72,066 (estimating gnatcatcher economic impact of $915 million); 75 Fed. Reg. at 12,858 (estimating red-legged frog economic impact of "$159 million to $500 million"). *Cf. Babbitt v. Sweet Home Chapter of*

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[14] *See also* Katherine A. Kiel, *Environmental Regulations and the Housing Market: A Review of the Literature* 21 (Apr. 2004), *available at* http://www.huduser.org/rbc/pdf/Environmental.pdf (last visited Oct. 19, 2010) ("What is clear is that environmental regulations do increase the price of housing."); To Amend the Endangered Species Act of 1973 To Reform the Process for Designating Critical Habitat Under That Act: Hearing on H.R. 2933 Before the H. Comm. on Resources, 108th Cong. 156-58, at 79 (2004) (statement of David L. Sunding, Professor, University of California at Berkeley) ("The Bay Area, the Inland Empire area of Southern California, coastal areas of Southern California, those are three cases where I think you can make a very strong general argument that environmental regulations are both driving up housing prices and also . . . pushing consumers to more and more distant locations, forcing them to commute longer and longer distances to their jobs, which causes all kinds of other regional economic and environmental problems."); Theo S. Eicher, *Housing Prices and Land Use Regulations: A Study of 250 Major US Cities* (Feb. 2008), *available at* http://depts.washington.edu/teclass/landuse/Housing051608.pdf (last visited Oct. 19, 2010) (study of 250 cities throughout the U.S., concluding that the "estimated increase in housing prices associated with regulations is . . . substantially larger than the effects of income and population growth").

Cmtys. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) (noting that the ESA's habitat protections "on private lands impose[] unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use"); *Catron County*, 75 F.3d at 1436 (observing that "[t]he record in this case [concerning critical habitat for two fishes] suggests that [its] impact will be immediate and the consequences could be disastrous"); To Amend the Endangered Species Act of 1973 To Reform the Process for Designating Critical Habitat Under That Act: Hearing on H.R. 2933 Before the H. Comm. on Resources, 108th Cong. 156-58, at 45 (2004) (statement of David L. Sunding, Professor, University of California at Berkeley) ("[C]ritical habitat designation does have the ability to profoundly impact the development and completion of housing projects. . . . Taken in total, the increase in development costs can easily be in the thousands of dollars per housing unit and can in some cases exceed $10,000."); Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 164 (2004) (observing that a court-ordered vacation to "critical habitat" for the Cactus ferruginous pygmy owl allowed "several major development projects within the former critical habitat area . . . to go forward without the kinds of costly mitigation measures that [the Service] had previously imposed on similar projects within that area"); Jonathan M. Cosco, Note, *NEPA for the Gander: NEPA's Application to Critical Habitat Designations and Other "Benevolent" Federal Action*, 8 Duke Envtl. L. & Pol'y F. 345, 366 (1998) (observing that "the [Service] could not possibly comply with its

statutory duty of considering the 'economic impact' of a critical habitat designation unless that designation had some practical, foreseeable effect on commercial land uses" (footnote omitted)).[15]

Thus, merely stating – as the Service and the Ninth Circuit do – that "critical habitat" designation has an economic impact, without analyzing that impact's *cumulative* effect, makes a farce of the "critical habitat" economic impacts assessment. After all, the addition of thousands of dollars in regulatory fees in Beverly Hills may hardly be noticed, but such an increase in other parts of the country could make the difference between affordable and unaffordable housing.

Yet ultimately, producing an accurate economic assessment means more than just having good information; the Service must use that economic information to determine whether any given unit of "critical habitat" may be excluded from the designation on the basis of excessive economic impacts. *See, e.g.*, 70 Fed. Reg. at 46,948-52 (discussing "economic" exclusions to vernal pools species "critical habitat"). *Cf.* 16 U.S.C. § 1533(b)(2) (authorizing "economic" exclusions to "critical habitat"). By failing to use a cumulative economic impacts analysis, the Service systematically understates the true economic impact of its designations and leaves untold acres of "critical

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[15] *See also* Gov. Sean Parnell, *On thin ice: Habitat designation won't help polar bears, but will kill Alaska's jobs*, Editorial, Wash. Post, Aug. 6, 2010, at A17 ("Whether it's hunting for food, building a sea wall to protect a village from ocean erosion or constructing a septic system to replace unsanitary sewage lagoons, all manner of activity in an area designated as critical habitat gets caught in the regulatory machine of the federal bureaucracy.").

habitat" unjustifiably subject to severe land-use restrictions.

CONCLUSION

A split exists between the Ninth and Tenth Circuits over whether the true and full costs of "critical habitat" designations should be taken into account before "critical habitat" may be designated. Whereas the Tenth Circuit holds that the Service must assess a large array of impacts, the Ninth Circuit holds that the Service may largely ignore the cumulative economic impacts of "critical habitat." The issue of whether the Service must analyze the cumulative economic impacts of "critical habitat" designation is of acute nationwide importance, given the country's current economic distress and such habitat's regularly adverse economic effects.

The petition for writ of certiorari should be granted.

DATED: October, 2010.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA; BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION; CALIFORNIA BUILDING INDUSTRY ASSOCIATION; CALIFORNIA STATE GRANGE; GREENHORN GRANGE,
Plaintiffs-Appellants,
v.
UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; GALE A. NORTON, in her official capacity as Secretary of Interior; H. DALE HALL, in his official capacity as Director of U.S. Fish and Wildlife Service; MATTHEW J. HOGAN, in his official capacity as Acting Director of U.S. Fish and Wildlife Service,
Defendants-Appellees,
BUTTE ENVIRONMENTAL COUNSEL; CALIFORNIA NATIVE PLANT SOCIETY; DEFENDERS OF WILDLIFE,
Defendants-Intervenors-Appellees.

No. 07-16732
D.C. No.
CV-05-00629-WBS
OPINION

Appendix A–2

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
June 15, 2010—San Francisco, California
Filed August 9, 2010

Before: Pamela Ann Rymer and
Raymond C. Fisher, Circuit Judges,
and Rebecca R. Pallmeyer, District Judge*

Opinion by Judge Pallmeyer

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* The Honorable Rebecca R. Pallmeyer, United States District Judge for the Northern District of Illinois, sitting by designation.

OPINION

PALLMEYER, District Judge:

Home Builders Association of Northern California[1] and other industry groups (collectively "Home Builders") challenge the designation by the U.S. Fish and Wildlife Service ("FWS") of about 850,000 acres of land as critical habitat for fifteen endangered or threatened vernal pool species. In the district court, Butte Environmental Council and other conservation groups (collectively "Butte Environmental") intervened as defendants in support of the designation, and they have participated in the appeal. The district court upheld the designation, and Home Builders appeals, raising five technical challenges to FWS's procedure. We conclude that none of those challenges have merit, and we affirm.

BACKGROUND

Vernal pools are a "unique kind of wetland ecosystem" that exists only temporarily. 68 Fed. Reg. 46,684, 46,685 (Aug. 6, 2003). The pools typically appear in spring—that is, vernally —following fall and winter rains before drying up until the following year. *Id.* Since the pools' existence depends on rainfall, pool size and location can vary from year to year. *Id.* at 46,685-86. To survive years in which no pool develops due to low rainfall, vernal pool species have developed a dormant stage: vernal pool plant seeds can remain viable for several years and the fertilized egg of a vernal pool crustacean can remain viable for ten years

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[1] While this appeal was pending, Home Builders Association of Northern California changed its name to Building Industry Association of the Bay Area. We follow the parties' lead and continue to refer to appellants as Home Builders.

or more. *Id.* at 46,687, 46,689. The egg develops a thick shell that protects it from extreme temperatures and even digestive enzymes, meaning that it can be transported within the digestive tracts of animals without harm. *Id.* at 46,687.

Three factors are necessary to the formation of vernal pools: a climate with a wet season to fill the pools and a dry season to evaporate them; soil that is impermeable or nearly impermeable to water so that rain water is not readily absorbed into the surface beneath the pools; and a topography that typically includes shallow depressions in which the pools form. *Id.* at 46,685. These factors tend to appear over continuous areas in which clusters of vernal pools—called complexes—are formed. *Id.* Vernal pool complexes include land that is not part of the pools themselves but that is necessary to provide water and nutrients to the pools: drainage pathways called "swales" and upland areas. *Id.* Alteration of those lands can negatively affect the health of the vernal pools themselves. *Id.*

Vernal pools are home to a diverse group of species, including freshwater crustaceans, amphibians, insects, and plants. *Id.* at 46,686. Those native species and the pools themselves provide food and habitat for various birds, toads, frogs, and salamanders. *Id.* Vernal pools are threatened by development of all kinds; researchers have estimated destruction of vernal pool habitat ranging from 60% in Oregon's Agate Desert area to 90% along the central California coast to nearly 100% in southern California. FWS, *Draft Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon* at I-15 (Oct. 2004), *available at* http://www.fws.gov/pacific/ecoservices/

endangered/recovery/vernal_pool/ (last visited July 7, 2010). Species that make their homes in vernal pools are at risk as a result of the destruction: between 1978 and 1997, FWS designated as endangered or threatened four crustacean and eleven plant species native to vernal pools. 62 Fed. Reg. 33,029 (June 18, 1997); 62 Fed. Reg. 14,338 (Mar. 26, 1997); 59 Fed. Reg. 48,136 (Sept. 19, 1994); 57 Fed. Reg. 24,192 (June 8, 1992); 43 Fed. Reg. 44,810 (Sept. 28, 1978).

Under the Endangered Species Act ("ESA"), FWS is required, "to the maximum extent prudent and determinable," to designate critical habitat at the same time that it lists a species as endangered or threatened. ESA § 4(a)(3)(A), 16 U.S.C. § 1533(a)(3)(A). Once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action likely to result in "the destruction or adverse modification" of that habitat without receiving a special exemption. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). To satisfy that prohibition, agencies must consult with the appropriate expert wildlife agency before any federal action that might affect critical habitat. *California ex rel. Lockyer v. U.S. Dep't. of Agric.*, 575 F.3d 999, 1018-19 (9th Cir. 2009). Although it designated the four crustacean species at issue here as endangered or threatened in 1994, FWS nevertheless declined to designate critical habitat at that time. FWS explained in the final rule designating the crustacean species that concurrent designation of critical habitat was "not prudent" because "such designation likely would increase the degree of threat from vandalism or other human activities." 59 Fed. Reg. at 48,151.

After FWS issued that final rule, a group of plaintiffs led by the Building Industry Association of Superior California challenged it in the District Court for the District of Columbia. The court rejected all of the plaintiffs' claims except their challenge to FWS's failure to designate critical habitat. The court ordered FWS to designate critical habitat, but before FWS could comply with the court's order, the plaintiffs struck the critical-habitat claim from their complaint so that they could take an immediate appeal from the denial of their other claims. *Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1244 (D.C. Cir. 2001). A group of plaintiffs including some of the defendant-intervenor-appellees in this case brought a critical-habitat claim in the District Court for the Eastern District of California. They too were successful, and the court ordered FWS to designate critical habitat for the vernal pool crustaceans. *Butte Envtl. Council v. White*, 145 F. Supp. 2d 1180 (E.D. Cal. 2001).

FWS complied with that order, and on September 24, 2002 issued a proposed rule to designate 1,662,762 acres in northern California and southern Oregon as critical habitat for the vernal pool crustaceans as well as the eleven plant species. 67 Fed. Reg. 59,884 (Sept. 24, 2002). After extensive public comment, FWS issued a final designation on August 6, 2003. 68 Fed. Reg. 46,684 (Aug. 6, 2003). Based on those comments, the final designation reduced the covered area by more than one million acres.[2] The final designation reflected

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[2] Although FWS estimated that the August 2003 designation covered 1,184,513 acres, it acknowledged that the estimate did not reflect certain exclusions it had made. 68 Fed. Reg at 46,684. The parties challenging the designation estimated that when those

(continued...)

the exclusion of five rapidly growing counties for economic reasons as well as exclusions for non-economic reasons—areas already protected, military areas, and tribal areas. *Id.* at 46,745-55. Litigation once again followed—the plaintiffs again included some of the intervenors here—and, in October 2004, the District Court for the Eastern District of California granted FWS's motion for voluntary remand for reconsideration of the exclusions.[3]

On December 28, 2004, FWS reopened the comment period for thirty days to obtain comments on both the economic and non-economic exclusions. 69 Fed. Reg. 77,700 (Dec. 28, 2004). After reconsideration, FWS made no changes to the non-economic exclusions. 70 Fed. Reg. 11,140, 11,140 (Mar. 8, 2005). FWS's reconsideration of the economic exclusions, however, did generate changes. As part of the reconsideration, FWS obtained a new economic analysis estimating the foreseeable economic impacts of the critical habitat designation. 70 Fed. Reg. 37,739, 37,741 (June 30, 2005). The analysis took a "baseline" approach: relying on guidance from the Office of

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[2] (...continued)
extra exclusions were considered, the total reduction was more than one million acres, reducing the area designated as critical habitat to about 600,000 acres. The district court adopted that estimate.

[3] FWS's request for a voluntary remand appears to have been motivated by its own concerns about the internal process that led to the exclusions. U.S. Dep't of the Interior, Office of Inspector General, *Investigative Report: The Endangered Species Act and the Conflict between Science and Policy* 106-12 (Dec. 10, 2008), *available at* http://www.doioig.gov/images/stories/reports/pdf/Endangered%20Species%20FINAL%20REDACTED5%20w_TOC_encryption.pdf (last visited July 7, 2010).

Management and Budget, it compared the current state of affairs—the baseline—with how things would look after designation of critical habitat. CRA International, *Economic Impacts of Critical Habitat Designation for Vernal Pool Species* 45-46 (June 20, 2005), *available at* http://www.fws.gov/economics/Critical%20 Habitat/Final%20Draft%20Reports/vernal%20pool%20species%20redo/VPS-6-20-05.pdf (last visited July 7, 2010). Based on that analysis, on August 11, 2005, FWS adopted new economic exclusions to the critical habitat designation. 70 Fed. Reg. 46,924, 46,948-52 (Aug. 11, 2005). Rather than excluding land in five rapidly growing counties as before, the new designation excluded twenty-three census tracts[4] for which FWS determined that the benefits of exclusion outweighed the benefits of inclusion. *Id.* FWS issued its final rule on February 10, 2006, designating 858,846 acres of land as critical habitat. 71 Fed. Reg. 7118 (Feb. 10, 2006).

Once again, litigation followed in the District Court for the Eastern District of California, this time from both sides. Home Builders and a group of intervenors challenged the final critical habitat designation for going too far, while Butte Environmental challenged it for not going far enough. The district court ultimately granted summary judgment to FWS on Home Builders's challenge. On Butte Environmental's challenge, though, the court ruled that FWS failed to properly consider the issue of species conservation, in addition to species survival, in

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[4] "Census tracts are relatively permanent small-area geographic divisions of a county or statistically equivalent entity defined for the tabulation and presentation of data from the decennial census and selected other statistical programs." 73 Fed. Reg. 13,836, 13,836 (Mar. 14, 2008) (footnote omitted).

violation of ESA as interpreted in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069-70 (9th Cir. 2004) (rejecting FWS's interpretation of "destruction or adverse modification" because it "reads the 'recovery' goal out of the adverse modification inquiry"). Accordingly, the district court remanded the designation for yet another reconsideration. While the remand was pending, Home Builders and the intervenors filed notices of appeal, which this court dismissed as premature under *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004). After the remand, which resulted in no substantive change to the designation, 72 Fed. Reg. 30,279 (May 31, 2007), the district court entered final judgment in favor of FWS, and Home Builders appealed. The plaintiff-intervenors also filed a notice of appeal but later dismissed it voluntarily. Butte Environmental did not file its own appeal from the district court's final judgment, but it has participated in this appeal as defendant-intervenor-appellee.

DISCUSSION

Our review of the district court's grant of summary judgment is *de novo*. *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 875 (9th Cir. 2009). Our review of FWS's decisions, however, is more deferential. Under the Administrative Procedure Act, we will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under that standard is narrow; we will not substitute our judgment for the agency's. *Tucson Herpetological Soc'y*, 566 F.3d at 875. Nevertheless, the agency must "'state a rational connection between the facts found

and the decision made.'" *Id.* (quoting *Gifford Pinchot*, 378 F.3d at 1065).

I. Use of Primary Constituent Elements (PCEs) in Critical Habitat Designation

[1] Home Builders's first challenge to the designation attacks FWS's classification, as critical habitat, of areas in which the physical or biological features essential to the conservation of the species do not occur simultaneously. Those "physical or biological features" are part of the definition of occupied critical habitat: "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." ESA § 3(5)(A)(i), 16 U.S.C. § 1532(5)(A)(i). FWS refers to such "physical or biological features" as "primary constituent elements" or "PCEs." *See* 50 C.F.R. § 424.12(b). In the August 2005 Rule, FWS stated that "[t]he PCEs described for each species do not have to occur simultaneously within a unit for the unit to constitute critical habitat for any of the 15 vernal pool species." 70 Fed. Reg. at 46,934.

Without challenging any specific designations, Home Builders argues generally that if an area that does not contain all PCEs is designated as an occupied critical habitat, then the PCEs not present cannot be essential to the conservation of the species, so should not be considered PCEs at all. On the other hand, Home Builders continues, if the absent elements are truly PCEs, then their absence means that the area cannot be essential to the conservation of the species. Logic and the unique characteristics of vernal pool complexes defeat this argument.

[2] In vernal pool complexes, the elements necessary to species survival are present in distinct areas. For example, each of the crustacean species has four PCEs: certain topographic features that feed the pools, certain depressional features where the pools form, sources of food, and structures within the pool that provide shelter. 70 Fed. Reg at 46,934-37. Quite obviously, the topographical features that feed the pools and the depressional features where the pools form will be found in different areas. In general, there is simply no reason that two elements essential for the conservation of a species need be present in the same area. As FWS points out, one critical habitat for a bird species might contain nesting grounds while another critical habitat contains feeding sites. As explained, such a separation is especially appropriate for species that live in vernal pool complexes.

[3] Home Builders also makes the perverse contention that by designating as critical habitat areas with fewer than all PCEs, FWS has impermissibly *limited* its designation to protecting only those elements essential to the protected species' survival as opposed to their recovery. This part of the argument relies on this court's holding that "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery." *Gifford Pinchot*, 378 F.3d at 1070. Thus, *Gifford Pinchot* requires FWS to be more generous in defining area as part of the critical habitat designation. Home Builders's attempt to use the case in support of its argument that FWS should have included *less* area within the critical habitat designation makes no sense. *Gifford Pinchot* says nothing about how many PCEs must be included in an area for it to be classified as

critical habitat. Accordingly, we find no legal support for Home Builders's argument.[5]

II. Identification of the Point at Which the Fifteen Species Will Be Conserved

[4] Home Builders next argues that FWS's determination of the PCEs is invalid because FWS failed to determine *when* the protected species will be conserved. ESA § 3(3) defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3). If FWS does not know *when* the species in question will be brought to this point, Home Builders argues, it cannot know what physical or biological features are required to bring the species there. A district court adopted this argument in another case brought by Home Builders. *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1214 (E.D. Cal. 2003). We disagree with that court's reasoning because it lacks legal support and is undermined by ESA's text.

[5] First, as the district court held in this case, there is no reason why FWS cannot determine what elements are necessary for conservation without determining exactly when conservation will be complete. *See also Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025-26 (D. Ariz. 2008), *aff'd on other grounds*, 606 F.3d 1160 (9th Cir.

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[5] Home Builders does not argue, and the record does not suggest, that FWS improperly designated critical habitat based on a goal of survival rather than what would be necessary to achieve conservation and recovery of the listed species.

2010). As FWS explains, all that ESA § 3(5)(A) requires before the designation of occupied critical habitat is a determination of what physical or biological features are essential to the conservation of the species. 16 U.S.C. § 1532(5)(A). Home Builders does not explain why it is impossible to determine the elements essential to a goal without determining when the goal will be achieved. A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one.

Home Builders attempts to rely on ESA's text as support for adding this requirement, but the statute actually runs contrary to its argument. ESA does require a determination of criteria for measuring when a species will be conserved, but that requirement applies to the preparation of a recovery plan. ESA § 4(f)(1)(B)(ii), 16 U.S.C. § 1533(f)(1)(B)(ii). Recognizing that this case does not involve a challenge to a recovery plan, Home Builders urges us to import the requirement to the designation of critical habitat, a completely different part of ESA. Home Builders undermines its argument for importation by advocating it selectively: Home Builders urges that another recovery plan requirement—providing a description of the management actions necessary to achieve conservation and survival—should not be imposed on critical habitat designations. ESA § 4(f)(1)(B)(i), 16 U.S.C. § 1533(f)(1)(B)(i). Home Builders's reasoning is that the second requirement "presumably would in most instances take considerable time and effort." Home Builders's argument for selective importation is an argument for Congress, not for the courts. Apart from its own preference, Homes Builders has not provided any valid reason to impose

requirements from one part of the statute onto another.

[6] Indeed, inclusion of the requirement for recovery plans shows that if Congress had intended such a requirement to apply to critical habitat designations, it would have said so. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and alteration omitted). Finally, we note that Congress's decision to apply the extra requirement to recovery plans but not to critical habitat designations is logical because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat.

III. Overlap Between Occupied and Unoccupied Habitat Designations

[7] Next, Home Builders contends that FWS erred by conflating the standards for occupied and unoccupied habitat. Although FWS described the protected habitat as being composed of "occupied" subunits, 70 Fed. Reg. at 46,945, it acknowledged that some areas that constitute unoccupied critical habitat will be present within some subunits, *id.* at 46,929, 46,934. Home Builders fails to explain how FWS's procedure here runs afoul of the statutory scheme. Under ESA § 3(5)(A), an area constitutes "critical habitat" if it meets the requirements for occupied habitat or for unoccupied habitat. 16 U.S.C. § 1532(5)(A). There is no requirement that every area be classified as one or the other, and, in the case of vernal pool complexes, which may change dramatically

from year to year, such a classification may be impossible. 70 Fed. Reg. at 46,929, 46,934.

[8] In any event, FWS ultimately concluded that "the areas designated by this final rule, including currently occupied and unoccupied areas, are essential for the conservation of these species." *Id.* at 46,930. Essential for conservation is the standard for unoccupied habitat, ESA § 3(5)(A)(ii), 16 U.S.C. § 1532(5)(A)(ii), and is a more demanding standard than that of occupied critical habitat. *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). Thus, basing the designation on meeting the more demanding standard poses no problem. Courts routinely apply similar reasoning in cases where a standard is unclear yet the result is the same under even the highest standard. *E.g., Brown v. S. Cal. IBEWNECA Trust Funds*, 588 F.3d 1000, 1003 (9th Cir. 2009) ("Because we agree with the district court that the result would be the same under either standard of review, we likewise need not decide the question.").

IV. Textual Exclusion of Areas Without PCEs

Home Builders also challenges the critical habitat designation as based on what it believes are areas that were designated as critical habitat despite containing no PCEs. In the final rule, FWS explained that in designating critical habitat, it "made every effort to avoid designating developed areas such as buildings, paved areas, boat ramps and other structures that lack the PCEs for the 15 vernal pool species." 70 Fed. Reg. at 46,930. FWS acknowledged that its best efforts may not have resulted in perfection and that "[a]ny such structures inadvertently left inside critical habitat boundaries are not considered part of the unit." *Id.*

Thus, federal actions limited to those areas would not require consultation with FWS if the action did not affect the species or the PCEs in the adjacent critical habitat. *Id.*

[9] Home Builders's argument here is that the explicit textual exclusion of the structures from the critical habitat designation is improper and the need for such an exclusion shows that the designation failed to satisfy ESA's requirement that "specific areas" be designated. ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A). FWS has interpreted this requirement in a regulation stating that "[e]ach critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area." 50 C.F.R. § 424.12(c). To be sure, FWS could not designate critical habitat by saying merely "we designate all areas that constitute critical habitat under ESA § 3(5)(A)." That is hardly what FWS did in this case, however. FWS began with data from sources that included the final rules listing the fifteen species, other recovery plans, reports by biologists, and academic reports published in peer-reviewed journals. 68 Fed. Reg. at 46,712. FWS then delineated the critical habitat using Arc-View, a computer program that relies on Geographic Information System data drawn from numerous sources. *Id.* at 46,713.

Next, FWS further refined the designation using "satellite imagery, watershed boundaries, geologic landform coverages, elevational modeling data, soil type coverages, vegetation/land cover data, and agricultural/urban land use data." *Id.* Despite those efforts, FWS acknowledged that some developed areas could have been included in the initial designation. 70 Fed. Reg. at 46,930. Even though the existence of such

areas was purely hypothetical, FWS then excluded them with an explicit textual reference. *Id.*

[10] Home Builders does not suggest a method that might have produced a more precise delineation of the protected area. Instead, it argues that the textual exclusion was prohibited because the regulation, 50 C.F.R. § 424.12(c), defines the exclusive method for designating critical habitat. The regulation itself, however, contains no suggestion that it is exclusive. And Home Builders fails to explain why we should not defer to the agency's interpretation of its own regulation, which, in the case of an ambiguous regulation, is controlling unless plainly erroneous or inconsistent with the regulation. *Chae v. SLM Corp.*, 593 F.3d 936, 948 (9th Cir. 2010) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Home Builders also argues that, based on the need for that exclusion, FWS's procedure did not produce a designation that was sufficiently specific. As explained, though, Home Builders offers no alternative procedure and points to no infirmity in the procedure used except that it may not have been perfect. Specificity does not require perfection; ESA requires only that FWS designate critical habitat "on the basis of the best scientific data available." ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2). Home Builders presents no valid reason not to defer to FWS on this issue.

V. Economic Impact Consideration

[11] Finally, Home Builders argues that FWS failed to properly account for the economic impact of its critical habitat designation. ESA mandates the consideration of economic impact before the designation of critical habitat. ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2); *Bennett v. Spear*, 520 U.S. 154, 172

(1997). To fulfill that requirement, FWS obtained an economic analysis from an outside consultant that relied on guidance from the Office of Management and Budget to compare the current state of affairs—the baseline—with how things would look after designation of critical habitat. Our court recently rejected a challenge to FWS's "baseline" approach in *Arizona Cattle Growers'*, 606 F.3d at 1172-74. The challenger in that case, relying on an opinion of the Tenth Circuit, unsuccessfully argued that FWS should instead have used a "co-extensive" approach, which "would take into account all of the economic impact of the [critical habitat designation], regardless of whether those impacts are caused coextensively by any other agency action (such as listing) and even if those impacts would remain in the absence of the [designation]." *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1283 (10th Cir. 2001). We declined to endorse that approach, explaining, "[t]he very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made." *Arizona Cattle Growers'*, 606 F.3d at 1173.

[12] In challenging the baseline approach here, Home Builders argues for a "cumulative" assessment that would include an assessment of the costs of

complying with other regulations.[6] Such an assessment would be necessary under the National Environmental Policy Act ("NEPA"), which requires a cumulative impacts analysis in which the agency considers the environmental impact that "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7; *see Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 814 (9th Cir. 2005). NEPA and ESA, though, are different statutes. While NEPA's regulations expressly require consideration of cumulative impacts, 40 C.F.R. §§ 1508.25(a)(2), 1508.7, neither ESA nor its implementing regulations do so. Rather, the plain language of ESA directs the agency to consider only those impacts caused by the critical habitat designation itself. ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2) (requiring the agency to consider "the economic impact . . . of specifying any particular area as critical habitat"). It is sensible to require a more thorough analysis under NEPA than under ESA. NEPA imposes requirements before the government takes action that might have negative consequences for the environment; ESA imposes requirements before the government takes action that will *protect* the environment.

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[6] As with its other arguments, Home Builders fails to make this one with any specificity. The economic analysis on which FWS relied in this case did include consideration of compliance with other regulations such as local zoning laws and state natural resource laws. CRA International, *Economic Impacts of Critical Habitat Designation for Vernal Pool Species*, *supra*, at 46 (June 20, 2005). We can only guess which existing regulatory impacts Home Builders believes FWS failed to consider.

Finally, Home Builders's position is contrary to *Arizona Cattle Growers*, 606 F.3d at 1172, where the court rejected the notion that "FWS was required to attribute to the critical habitat designation economic burdens that would exist even in the absence of that designation." That opinion also expressly approved the baseline approach to economic analysis, under which "any economic impacts of protecting the [listed species] that will occur regardless of the critical habitat designation . . . are treated as part of the regulatory 'baseline' and are not factored into the economic analysis of the effects of the critical habitat designation." *Id.* Beyond arguing that FWS failed to follow the requirements of statutory and regulatory provisions that have no application, Home Builders raises no other argument that anything was insufficient about FWS's consideration of the economic impact of its designation.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Appendix B–1

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA; *et al.*, and BUTTE ENVIRONMENTAL COUNCIL, *et al.*,	FILED July 31, 2007
Plaintiffs,	No. 2:05-cv-00629-WBS-KJM (lead); No. 2:05-cv-02524-WBS-KJM (consolidated)
and	
CITY OF SUISUN and TSAKOPOULOS INVESTMENTS, *et al.*,	~~[PROPOSED]~~ **ORDER**
Plaintiff-Intervenors,	
v.	
UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,	
Defendants,	
and	
DEFENDERS OF WILDLIFE, *et al.*,	
Defendant-Intervenors.	

This matter is before the Court on Federal Defendants' Consent Motion for Entry of Judgment. For good cause shown, and because the remand required by the Court's orders dated November 2, 2006

(Dkt. 157) and January 24, 2007 (Dkt. 189) has been completed, the Court determines that final judgment should be entered terminating these consolidated cases. Accordingly, consistent with the terms of the Court's November 2, 2006 and January 24, 2007 orders, it is hereby ORDERED AND ADJUDGED as follows:

1. The motion for summary judgment filed by Plaintiffs Home Builders Association of Northern California, Building Industry Legal Defense Foundation, California Building Industry Association, California State Grange, and Greenhorn Grange is DENIED.

2. The motion for summary judgment filed by Plaintiffs-Intervenors Tsakopoulos Investments, Tsakopoulos Family Trust, Drosoula Tsakopoulos, and George Tsakopoulos is DENIED.

3. The motion for summary judgment filed by Plaintiffs Butte Environmental Council, Defenders of Wildlife, California Native Plant Society, San Joaquin Raptor and Wildlife Rescue Center, Sierra Foothills Audubon Society, and Vernalpools.org (collectively the "Environmental Groups") is GRANTED on the limited ground that the U.S. Fish and Wildlife Service failed to consider the recovery standard under the Endangered Species Act, pursuant to the Ninth Circuit's guidance in Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service, 378 F.3d 1059, 1069 (9th Cir. 2004). In all other respects, the Environmental Groups' motion for summary judgment is DENIED.

4. Except as provided in paragraph 3 above, the motion for summary judgment filed by Federal Defendants United States Fish and Wildlife Service;

H. Dale Hall, Director of the United States Fish and Wildlife Service; the United States Department of the Interior; and Dirk Kempthorne, Secretary of the Interior, is GRANTED.

5. This Order and Judgment shall constitute FINAL JUDGMENT of the Court to these consolidated cases.

IT IS SO ORDERED.

DATED: 7/31, 2007

/s/ William B. Shubb
HONORABLE WILLIAM B. SHUBB
UNITED STATES DISTRICT COURT

Appendix C–1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, CALIFORNIA STATE GRANGE, and GREENHORN GRANGE,

Plaintiffs,

and

CITY OF SUISUN,

Plaintiff-Intervenor,

and

TSAKOPOULOS INVESTMENTS, TSAKOPOULOS FAMILY TRUST, DROSOULA TSAKOPOULOS, and GEORGE TSAKOPOULOS,

Plaintiff-Intervenors,

v.

FILED
Nov. 2, 2006

NO. CIV. S-05-0629 WBS-GGH

MEMORANDUM AND ORDER

UNITED STATES FISH AND WILDLIFE SERVICE; H. DALE HALL, Director of the United States Fish and Wildlife Service; UNITED STATES DEPARTMENT OF INTERIOR; and GALE A. NORTON, Secretary of the United States Department of Interior,

Defendants,

and

DEFENDERS OF WILDLIFE, BUTTE ENVIRONMENTAL COUNCIL, AND CALIFORNIA NATIVE PLANT SOCIETY,

Defendant-Intervenors.

BUTTE ENVIRONMENTAL COUNCIL, DEFENDERS OF WILDLIFE, CALIFORNIA NATIVE PLANT SOCIETY, SAN JOAQUIN RAPTOR AND WILDLIFE RESCUE CENTER, SIERRA FOOTHILLS AUDUBON SOCIETY, and VERNALPOOLS.ORG,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, and U.S. FISH AND WILDLIFE SERVICE,

Defendants.

Plaintiffs brought this action pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* Plaintiffs challenge the United States Fish and Wildlife Service's (hereafter "FWS") critical habitat designation of over 800,000 acres of land in California and Oregon for fifteen vernal pool species. Currently pending before the court are five cross-motions for summary judgment filed by plaintiffs, Home Builders Association of Northern California, et al. ("Home Builders"); plaintiffs and defendant-intervenors, Butte

Environmental Council, et al. ("Environmental Groups"); plaintiff-intervenor, the City of Suisun ("Suisun"); plaintiff-intervenors Tsakopoulos Investments, et al. ("Tsakopoulos Investments"); and defendants, the United States Fish and Wildlife Service, H. Dale Hall, and Gale A. Norton ("Federal Defendants"). Defendant-intervenor, Placer Ranch, Inc. ("Placer Ranch") filed an opposition to the Environmental Group's motion for summary judgment. Also pending before the court is a motion to strike filed by the Federal Defendants.

I. Factual and Procedural History

Beginning in 1978 and continuing through 1997, pursuant to the Endangered Species Act, the FWS listed as endangered fifteen species of plants and animals that live in vernal pool environments.[1] *See* 43 Fed. Reg. 44,810 (Sept. 28, 1978); 57 Fed. Reg. 24,192 (June 8, 1992); 59 Fed. Reg. 48,136 (Sept. 19, 1994); 62 Fed. Reg. 14,338 (Mar. 26, 1997); 62 Fed. Reg. 33,029 (June 18, 1997). The fifteen species are four crustaceans (the Conservancy fairy shrimp, the longhorn fairy shrimp, the vernal pool fairy shrimp, and the vernal pool tadpole shrimp), and eleven plants (the Butte County meadowfoam, Contra Costa goldfields, Hoover's spurge, succulent or fleshy owl's clover, Colusa grass, Greene's tuctoria, hairy Orcutt grass, Sacramento Orcutt grass, San Joaquin Valley

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[1] In enacting 16 U.S.C. § 1533 of the Endangered Species Act, Congress directed that the Secretary of Commerce shall determine whether species are threatened or endangered species, and inform the Secretary of the Interior of such determinations. In turn, the Secretary of Interior shall list species that are threatened or endangered and "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533.

Orcutt grass, slender Orcutt grass, and Solano grass). 67 Fed. Reg. 59,884 (Sept. 24, 2002). These fifteen species are distributed in vernal pool complexes located throughout southern Oregon, parts of California, and parts of northern Mexico. 70 Fed. Reg. 46,925 (Aug. 11, 2005).

A. The Vernal Pool Habitat

The vernal pool ecosystem in which these species are found is a unique form of wetland that is rendered distinctive by its temporary existence. 67 Fed. Reg. at 59,884. Vernal pools typically form when precipitation pools above a soil layer that is virtually impermeable to water. *Id.* at 59,885. The pools usually occur in complexes, or clusters, that are fed with water by "low drainage pathways" called swales. *Id.* They are generally found in Mediterranean climates that have dry seasons when evaporation exceeds rainfall, and wet seasons with mild temperatures, during which animals and plants reach maturity and reproduce. *Id.* Vernal pools cycle through four different phases: the wetting phase, when the soil becomes saturated; the aquatic phase, when the pool is filled with water; the water-logged drying phase, when the water begins to evaporate and seep into the surrounding soil, keeping the soil moist; and the dry phase, when the pool has disappeared and the soil becomes completely dry. *Id.* Because the existence of a pool is dependent on rainfall, there are years when vernal pools fill to a lesser or greater extent, and years when they do not fill at all. *Id.* This feature of the ecosystem effectively excludes fish and other predators, and allows species that can survive during the dry phase to flourish in their absence. *Id.* at 59,884.

Many of the nutrients on which the vernal pools depend come from detritus, organic matter that washes into the pools through the swales from nearby uplands. 70 Fed. Reg. at 46,925. The four crustacean species consume detritus as one of their primary sources of food. *Id.* The crustacean species inhabiting vernal pools have also adapted to the dry phase of their environment by developing a dormant stage. *Id.* at 59,887. After being fertilized, the eggs develop a thick shell with many layers. *Id.* At a late stage of embryonic development, the embryo stops growing and its metabolism slows dramatically, and the egg becomes known as a "cyst." *Id.* In its desiccated state, a cyst can remain viable for many years and is able to withstand fire, freezing, temperatures near boiling, oxygen deprivation, and exposure to enzymes inside another animal's digestive tract. *Id.* It is not clear what signals the cysts to hatch, but not all dormant cysts will hatch in a given season—some cysts will remain dormant, thus protecting against complete reproductive failure if the vernal pool dries up prematurely. *Id.* at 59,887.

Vernal pool plants are similarly well-adapted to the vernal pool environment. They are annuals, which means that they germinate, grow, and propagate in the span of a year. *Id.* at 59,889. Much like the cysts of the vernal pool crustaceans, vernal pool plants produce seeds that may remain dormant, but still viable, for many years; additionally, there is a "seed bank" of dormant seeds continuously maintained to ensure survival in the event that the aquatic stage of the pool ends prematurely. *Id.* Vernal pool plants are able to resist invasion by non-native plants because of the severe conditions ensure that native plants are uniquely able to survive. *Id.* at 59,885.

The physical, geographic, and biological characteristics of vernal pools are somewhat varied, and for this reason, scientists have developed different classifications for vernal pools based on the nature of the underlying soil layer that traps the water and enables the pools to form. *Id.* at 59,886 (citation omitted). Vernal pool habitats are jeopardized by urban development, encroachment upon the water supply, activities to control flooding, and the conversion of land to agricultural use. *Id.* at 59,889.

B. The Critical Habitat Designation

In September, 1994, when the FWS listed four species of fairy shrimp as endangered, it determined that critical habitat designation for the fairy shrimp was "not prudent" because "such designation likely would increase the degree of threat from vandalism or other human activities." 59 Fed. Reg. at 48,151. In February, 2001, this court joined other courts' findings in determining that the FWS' deviation from its statutory mandate to designate critical habitat, concurrently with the listing of a species as endangered, violated the APA. *Butte Envtl. Council v. White*, 145 F. Supp. 2d 1180, 1185 (E.D. Cal. 2001). At that time, this court ordered the defendants to designate critical habitat for the Conservancy fairy shrimp, longhorn fairy shrimp, vernal pool fairy shrimp, and the vernal pool tadpole shrimp, and publish its final designation by August 15, 2001. *Id.* However, on July 23, 2001, the parties stipulated to a one-year extension for the critical habitat designation and the additional designation of critical habitat for eleven vernal pool plant species. *Butte Envtl. Council v. Norton*, slip op., 04-0096, at 3 (N.D. Cal. Oct. 28, 2004). The FWS did not comply with this deadline. *Id.*

The FWS published a proposed rule to designate 1,662,762 acres of critical habitat for the fifteen vernal pool species on September 24, 2002. 67 Fed. Reg. 59,884. The proposed rule excluded land from the critical habitat designation if the economic benefits of exclusion were found to outweigh the economic benefits of inclusion, if areas were already under the supervision of the state (e.g., areas within National Wildlife Refuges), or if the lands belonged to the Department of Defense or a Native American tribe. 68 Fed. Reg. 46,684, 46,746-54.

Pursuant to a settlement agreement, the FWS was to issue a critical habitat designation by July, 2003. The FWS issued an "initial" final critical habitat designation on August 6, 2003, that diminished the amount of critical habitat by more than one million acres. 68 Fed. Reg. 46,684; *see Butte Envtl. Council*, No. 04-0096 at 4. In January, 2004, Environmental Groups challenged these exclusions from the critical habitat designation in this court. *Butte Envtl. Council*, No. 04-0096, at 4. The court remanded for reconsideration, but did not set aside the critical habitat designation in the interim. *Id.* Instead, the court required that the FWS "reconsider the exclusions from the final designation of critical habitat for the 15 vernal pool species, with the exception of those lands within the five California counties that were excluded based on potential economic impacts, and publish a new final determination as to those lands within 120 days." *Id.* Additionally, the FWS was to "reconsider the exclusion of the five California counties based on potential economic impacts and publish a new final determination no later than July 31, 2005." *Id.*

On December 28, 2004, the FWS published notice that it would reopen the comment period and solicit public comment on the economic and non-economic exclusions of land made in the proposed rule published on September 24, 2002. 69 Fed. Reg. 77 700, 77,702-03 (Dec. 28, 2004). This comment period occurred in two parts—the FWS accepted comments on the non-economic exclusions and on the fifteen vernal pool species first, and then on the economic exclusions. *Id.* at 77,700. On March 8, 2005, the FWS confirmed its non-economic exclusion determinations in the August, 2003, final rule. 70 Fed. Reg. 11,140 (Mar. 8, 2005). On June 30, 2005, the FWS published notice of a consulting firm's economic analysis of the critical habitat designation proposed in 2002, which concluded that the designation would cost $ 992 million over the next twenty years. 70 Fed. Reg. 37,739, 37,739. The consulting firm also ranked the census tracts based on the opportunity costs that would result if they were designated as critical habitat. 70 Fed. Reg. at 37,740.

In its June 30 notice, the FWS noted that it was contemplating the exclusion of either 20, 35, or 50 of the census tracts that would suffer the greatest economic impact. 70 Fed. Reg. at 37,740. Accordingly, the FWS solicited additional comments on this economic analysis for twenty days. *Id.* at 37,741. The comment period was abbreviated to ensure compliance with the July 31, 2005, deadline set by this court for a final designation. *Id.*

On August 11, 2005, the FWS published its final rule designating approximately 858,846 acres of critical habitat in 34 California counties and one county in southern Oregon. 70 Fed. Reg. 46,924 (Aug. 11, 2005). This final rule excluded the 20 census

tracts that would suffer the greatest economic impact, along with three for which the economic benefits of exclusion outweighed the benefits of inclusion. *Id.* at 46,931-32, 46,948-52. On February 10, 2006, the FWS published an administrative rule that more specifically, indicated the species-specific unit descriptions and maps for the protected species. 71 Fed. Reg. 7,119 (Feb. 10, 2006).

II. Discussion

In their cross-motion for summary judgment, the Federal Defendants argue that the court is divested of jurisdiction over certain claims brought by Home Builders, Tsakopoulos Investments, and Suisun because of a failure to give 60-days notice to the agency of their respective claims. The Environmental Groups echo these arguments with respect to certain claims brought by plaintiffs Home Builders. The court will address these arguments first, as it must entertain jurisdictional matters before all others. *Kerr-McGee Chem. Corp. v. U.S. Dep't of Interior*, 709 F.2d 597, 600 (9th Cir. 1983).

A. Jurisdiction

1. Notice Requirement under the ESA

The Endangered Species Act (ESA) authorizes citizen suits under 16 U.S.C. §§ 1531-44. The section that is relevant here, 1540(g)(2)(A)(i), authorizes citizen suits with the following limitation: "No action may be commenced under subparagraph (1)(A) of this section . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation . . . ." Compliance with this provision of the ESA is a jurisdictional prerequisite to filing suit. *Sw. Ctr. for*

Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520 (9th Cir. 1998). "A failure to strictly comply with the notice requirement acts as an *absolute bar* to bringing suit under the ESA." *Id.* (citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 26-28, 110 S. Ct. 304, 107 L. Ed. 2d 237 (1989); *Lone Rock Timber Co. v. U.S. Dept. of Interior*, 842 F. Supp. 433, 440 (D. Or. 1994)) (emphasis added). Accordingly, "[t]he citizen suit notice requirements cannot be avoided by employing a 'flexible or pragmatic construction.'" *Kern County Farm Bureau v. Badgley*, No. 02-5376, 2002 U.S. Dist. LEXIS 24125, at *20 (E.D. Cal. Oct. 10, 2002) (quoting *Hallstrom*, 493 U.S. at 26).

Although claims against the Secretary that do not fall within the scope of the ESA may be brought under the APA, 5 U.S.C. § 704, this section "authorizes review only when 'there is no other adequate remedy in a court.'" *Bennett v. Spear*, 520 U.S. 154, 173-74, 161-162, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (quoting 5 U.S.C. § 704). Thus, if a claim falls within the scope of the citizen-suit provision, that is, if it alleges violations of § 1533, the APA is unavailable and cannot be used to circumvent the ESA's notice requirements. *See Hawaii County Green Party v. Clinton*, 124 F. Supp. 2d 1173, 1193 (D. Hawaii 2000) ("Although the APA does not contain the 60 day notice provision, a plaintiff cannot claim that the suit falls under the APA in order to avoid the notice requirement . . . . A rule that allowed a plaintiff to choose between bringing a claim under the APA or the ESA would allow plaintiffs to circumvent the 60 day notice requirements of the ESA.").

2. Plaintiffs Home Builders

The Federal Defendants contend that the court lacks jurisdiction over Home Builders' fifth and sixth causes of action because they failed to give 60 days' notice to the Secretary about the substance of those claims. The Environmental Groups make the same argument with regard to claims one, two, and three.

In November and December, 2004, plaintiffs Home Builders sent Federal Defendants notice of their intent to challenge the August, 2003 Final Rule. (Doc. # 31, Ex. 1 & 2 (Home Builders' Notice to FWS).) Home Builders listed six legal challenges, including two challenges that are relevant here—namely, that Federal Defendants failed to conduct the required exclusion analysis in violation of § 1533(b)(2) and failed to adequately evaluate the economic impact of designating critical habitat, also in violation of § 1533(b)(2). (*See id.*, Ex. 1 at 6.) Subsequently, Federal Defendants reopened the public comment period with respect to the economic analysis and the exclusions in the August, 2003 Final Rule, prompted by an order from this court. In August, 2005, Federal Defendants published the 2005 Final Rule designating critical habitat.

Upon review of the record, it is apparent that the 2005 Final Rule is a hybrid of new analysis and previous analysis taken from the 2003 Rule. The record reflects that the 2003 Rule was adapted and revised after the Federal Defendants reexamined the exclusions and economic impact. *See* 70 Fed. Reg. 46,924 (Aug. 11, 2005) ("We, the [FWS], have re-evaluated the economic analysis made in our previous final rule . . . ."); 70 Fed. Reg. 11,140 (Mar. 8,

2005) ("We, the [FWS], confirm the non-economic exclusions made to our previous final rule . . . .").

For the reasons discussed below, the court concludes that Home Builders' notice was sufficient. Home Builders' notice specifically alleged that Federal Defendants failed to make proper exclusions and failed to appropriately analyze the economic impact of the designation. Home Builders subsequently filed suit alleging a claim for failure to adequately evaluate economic impacts of the critical habitat designation (claim five) and a claim for failure to properly conduct the mandatory exclusion analysis (claim six). (*See* Pls. Home Builders' First Am. Compl. ¶ 13.) A simple comparison between the allegations in the notice and the allegations in the complaint reveal that the Federal Defendants had notice of Home Builders' intentions.[2]

As discussed previously, the purpose of the notice requirement is to give the federal government an opportunity to comply with the allegations, thereby rendering a citizen suit unnecessary. *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1072 (9th Cir. 1996). Implicit in the notice provision is that, should the Federal agency *not* comply or rectify the violation, the citizen will bring suit. That is exactly what happened here: Federal Defendants failed to rectify the alleged violations in a manner satisfactory to Home Builders. It does not follow, however, that Home Builders must now file a new notice of intent to sue.

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[2] Although Home Builders' sixth claim for relief alleges that Federal Defendants improperly limited their exclusion analysis to twenty-three of the most affected census tracts, which plaintiffs admit was not expressly noticed, plaintiffs' noticed arguments regarding the FWS' approach to cost-benefit analysis apply with equal force to this claim.

For the purposes of the notice requirement, it is sufficient that Home Builders gave Federal Defendants notice of the issues they would pursue in litigation and subsequently filed suit on those exact issues. There is certainly no statutory language in the ESA citizen-suit provisions that requires a citizen to renew their notice each and every time the FWS reevaluates its previous rule. In *Marbled Murrelet*, plaintiff filed a notice that did not clearly delineate which section of the ESA the defendant allegedly violated. The court determined that although the relevant section of the statute was "referenced in only one part of the letter, the letter as a whole provided notice sufficient to afford the opportunity to rectify the asserted ESA violations[, and t]his was sufficient to satisfy the jurisdictional requirement of notice." *Id.* at 1074. Additionally, in relation to the Clean Water Act, which has a 60-day notice provision that is similar to the ESA, the Ninth Circuit has held that a notice given before the rule it challenged was amended, which substantially provided the agency with the requisite notice, did not need to be re-filed. *Natural Resources Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 996 (9th Cir. 2000).

Similarly, Home Builders' letter to Federal Defendants "as a whole provided notice sufficient to afford" Federal Defendants the opportunity to rectify the violations. The fact that Federal Defendants attempted to respond to the allegations to some degree does not mean that Home Builders must refile a notice to sue. *See Water Keeper Alliance v. U.S. Dept. of Defense*, 152 F. Supp. 2d 163, 174 (1st Cir. 2001) (concluding that an environmental group's notice of intent to sue Department of Defense under the ESA regarding a biological opinion was adequate notice, even where a new biological assessment was issued in

the interim—the notice made clear that group intended to challenge an ongoing delinquency in the preparation of a biological assessment).

Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, on which Federal Defendants rely, is distinguishable. 143 F.3d 515, 521 (9th Cir. 1998). There, the court concluded that none of plaintiff's notice letters informed the Service that plaintiff had a grievance about the specific habitat at issue in the litigation. The court found that, as a result of this deficiency, "neither party was able to resolve that particular grievance in the litigation-free window provided for under the ESA notice provision." *Id.* The court explained that the plaintiff "was obligated to provide sufficient information of a violation so that the [FWS] could identify and attempt to abate the violation." *Id.*

Likewise, *Moden v. U.S. Fish & Wildlife Service* does not support Federal Defendants' contention that Home Builders did not provide defendants with sufficient notice. 281 F. Supp. 2d 1193, 1206 (D. Or. 2003). In *Moden*, the plaintiffs' initial notice charged the agency with a duty to remove certain endangered species from the list. *Id.* at 1205. However, the agency had not considered, let alone rejected, the petition to delist the species, so the plaintiffs' notice that it would sue the agency for committing an unlawful action was premature. *Id.* at 1206. Finally, Federal Defendants cite a decision by Judge Ishii that is expressly distinguishable from this case. In *Kern County Farm Bureau v. Badgley*, the plaintiff filed notice of its intent to sue the agency for a final rule regarding the listing of an endangered species before the agency's final rule issued. No. 02-5376, 2002 U.S. Dist. LEXIS 24125, at

*35-36 (E.D. Cal. Oct. 10, 2002). Distinguishing *Natural Resources Defense Council*, Judge Ishii indicated that "[t]his is not a case in which the Secretary submitted two final rules—one before the notice letter was sent and one afterwards." 2002 U.S. Dist. LEXIS 24125, at *36.

Here, Home Builders filed its notice with regard to a final rule promulgated by the agency, and the final rule was amended after the notice was filed. Home Builders' notice clearly informed the Federal Defendants of the very allegations Home Builders planned to raise, and subsequently did raise, in the instant litigation. The fact that the parties' use of the "litigation-free" window failed to resolve Home Builders allegations does not render Home Builders' notice moot. Rather, it merely signifies that the parties failed to reach an agreement to resolve the dispute. For these reasons, the court concludes that Home Builders complied with the notice requirement, and this court therefore has jurisdiction over the claims in their complaint.

3. Plaintiff-Intervenors Tsakopoulos Investments

The Federal Defendants further argue that Tsakopoulos Investments did not provide the FWS with notice of its claims 60 days before bringing suit, as required under the ESA. Tsakopoulos Investments sent notice to the FWS on March 6, 2006. (Kate O'Leary Decl. Ex. 4 (Formal Petition to the FWS) (Doc. # 68).) Tsakopoulos Investments filed suit and moved to intervene in the case on March 14, 2006, only eight days after providing the Secretary with notice. *Tsakopoulos Invs. v. Allen*, slip op., No. 06-542 (E.D.

Cal. Mar. 14, 2006); (Mar. 14, 2006 Mot. to Intervene as Pls.).

Tsakopoulos Investments maintains that its claims were brought pursuant to the APA and not the ESA because the "ESA does not provide a cause of action in situations like this, where the Fish and Wildlife Service has executed its mandatory duty to designate critical habitat, but has done so in an arbitrary and capricious manner." (Tsakopoulos' Reply 3:12-25.) In making this argument, Tsakopoulos Investments incorrectly contends that it can avoid the ESA's notice requirement by manipulating the nature of claims that arise under the ESA. *See Hawaii County Green Party*, 124 F. Supp. 2d at 1193 (D. Hawaii 2000) (concluding that "a particular claim may only be brought under either the APA or the ESA—a plaintiff may not chose her statutory weapon").

Tsakopoulos Investments further misconstrues what constitutes a "non-discretionary decision." Contrary to Tsakopoulos Investments' contentions, the terms of § 1533 are "plainly those of obligation rather than discretion." *Assoc. of Cal. Water Agencies ("ACWA") v. Evans*, 386 F.3d 879, 883 (9th Cir. 2004). Among other things, the statute states that the "Secretary *shall* designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . ." § 1533(b)(2) (emphasis added). In other words, § 1533 sets out required considerations for the determination of critical habitat and the section is crafted in mandatory language.

In *Bennett v. Spear*, the Supreme Court confirmed that the citizen suit provisions of the ESA apply to allegations that the Service ignored requisite

considerations set forth by § 1533. 520 U.S. at 171-72. As in this case, the plaintiffs in *Bennett* challenged an FWS decision on the basis that defendants had failed to take into account the possible economic impact of the decision, as specifically required by § 1533. In *Bennett*, the government argued that the citizen suit provision did *not* apply to the failure to consider economic impact. The court rejected that argument and confirmed that § 1533 sets forth mandatory, non-discretionary requirements, that terms stating that the Secretary "shall" take specific action "are plainly those of obligation rather than discretion," and that claims alleging failure to comply with such a mandate come within § 1540(g)(1)(C). *Id.*

Similarly, plaintiffs' allegations here invoke the requirements of § 1533. Indeed, a plain reading of Tsakopoulos Investments' complaint reveals allegations of the Federal Defendants' failure to take specific actions that are "plainly those of obligation rather than discretion." *Id.* As the Federal Defendants point out, Tsakopoulos Investments' third cause of action is almost identical to the issue presented in *ACWA*, in which the Ninth Circuit concluded that the claim fell squarely within the scope of the citizen suit provision. 386 F.3d at 884. The Ninth Circuit concluded that the failure to conduct an economic review pursuant to § 1533(b)(2) was a claim governed by the citizen suit provision of the ESA. *See id.* Tsakopoulos Investments' third cause of action alleges that Federal Defendants violated the ESA by failing to adequately evaluate the economic impact of designating critical habitat in violation of 1533(b)(2). Thus, like the plaintiffs in *ACWA*, Tsakopoulos Investments' third claim seeks to enforce mandatory

duties imposed by the ESA, and this claim is therefore subject to the notice requirement.

The remainder of the claims in Tsakopoulos Investments' complaint similarly refer to mandatory duties that the FWS must perform under the ESA. Tsakopoulos Investments' first claim alleges that the Federal Defendants failed to adequately identify physical or biological features essential to conservation, as *required* by the ESA; the second claim also alleges that the Federal Defendants failed to identify the geographic areas identified by the species, as *required* by the ESA; the third claim is for the failure to comply with the ESA's direction that "the Secretary *shall* designate critical habitat . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact;" the fourth claim relates to the FWS' failure to consider the best available scientific and commercial data as *required* by the ESA; the fifth claim relates to the failure to conduct the *mandatory* exclusion analysis; and the sixth and seventh claims allege that the FWS failed to adequately comply with the notice and comment requirement as *required* by the APA and the ESA.[3] (*Id.*) Thus, the court concludes that the

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[3] In its seventh cause of action, Tsakopoulos Investments does not clarify what statutory provision was violated by the FWS's failure to adequately respond to public comments, but it alleges it arises under the APA. This claim could relate to the failure to provide a meaningful notice and comment period and to the economic exclusion analysis, both of which are mandatory duties under the ESA that are subject to the notice requirement. However, because the statutory basis for the claim is somewhat unclear, it may be that this claim alone is not subject to the ESA's notice requirement, and therefore may not be jurisdictionally foreclosed. Even if Tsakopoulos Investments is not barred from

(continued...)

notice requirement applies to the claims in Tsakopoulos Investments' complaint.

Tsakopoulos Investments additionally argues that the Federal Defendants contradict themselves by contending on the one hand that the mandatory nature of their critical habitat designation subjects Tsakopoulos Investments' claims to the ESA's notice requirement, and on the other hand that this court

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[3] (...continued)
alleging the seventh claim in its complaint, however, the claim is meritless. In this claim, Tsakopoulos Investments alleges that,

> Defendants failed to adequately respond to significant comments, in violation of the APA. Defendants received Blueprint growth projections to 2025 by census tract for Sacramento County, but declined to use these growth figures in the August 2005 Final Rule. This failure to comply with the APA constitutes agency action that is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(Compl. ¶¶ 67-68.) Tsakopoulos Investments is referring to a "vision" developed by the Sacramento Area Council of Government ("SACOG") regarding growth in Sacramento County over the next fifty years, called a "Preferred Blueprint Alternative." (Admin. R. Vol. 2, Doc. # 291, at 17021719.)

The FWS received this comment and considered it, but ultimately rejected it as lacking merit. 70 Fed. Reg. at 46, 931. The economic analysis the FWS commissioned was a twenty-year analysis, not a fifty-year analysis like the Blueprint. Therefore, it would have been difficult to integrate the Blueprint's analysis into the existing analysis the FWS conducted. Additionally, SACOG indicated that the Blueprint was not in a form where it could be considered "likely to occur" (Admin. R. Vol. 2, Doc. # 291, at 17021707), and it was only a version that would be prepared in the year 2030 that would "represent the land use pattern that is most likely to be built in the region." (*Id.* at 17021707, 17, 19.) For these reasons, even if the court had jurisdiction over this claim, it would conclude that the FWS's decision to disregard the Blueprint was not arbitrary or capricious.

should review the agency decision under a discretionary standard. The Supreme Court has rejected this very argument, explaining that:

> [T]he fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical requirement that, in arriving at his decision, he "take into consideration the economic impact, any other relevant impact" and "use the best scientific data available." It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.

Bennett, 520 U.S. at 172.

The court further finds persuasive that on March 6, 2006, Tsakopoulos Investments sent Federal Defendants a letter in which it stated, "[t]his letter also constitutes our 60-Day Notice of Violation in accordance with 16 U.S.C. § 1540(g)(2)(A) and (c)." In this letter, Tsakopoulos Investments appears to admit that the 60-day notice applied to its complaint and that it was in fact bringing suit pursuant to the citizen suit provision of the ESA. Yet, despite the apparent admission in this letter, Tsakopoulos Investments filed its complaint only eight days later.

Finally, this conclusion is in keeping with the very purpose of the citizen-suit provision, which is to give defendants an "opportunity to review their actions and take corrective measures if warranted. The provision therefore provides an opportunity for settlement or other resolution of a dispute without litigation." *Southwest Center*, 145 F.3d at 520. For these reasons,

the court concludes that it lacks jurisdiction over all causes of action alleged by Tsakopoulos Investments and cannot consider their merits.

4. Plaintiff-Intervenor City of Suisun

The Federal Defendants also contend that the court lacks jurisdiction over Plaintiff-Intervenor City of Suisun's claims. On March 3, 2006, the court permitted intervention by the City but restricted the City's involvement "to raising arguments which relate to the issues concerning the species which are on the 88-acre parcel of land that is within the sphere of influence and the area designated as critical habitat." (Mar. 3, 2006 Order 5-6.) Plaintiff-intervenor City of Suisun alleges eight claims for relief, the first seven of which refer to mandatory duties for the FWS under 16 U.S.C. § 1533(a)(3) & (b)(2). As previously discussed, under the ESA, "any person may commence a civil suit *on his own behalf*" beginning "sixty days after written notice of the violation has been given to the Secretary." 16 U.S.C. § 1540(g)(1) (emphasis added). The United States Supreme Court has established that this notice requirement is a mandatory condition precedent for suit, and that the requirement is to be "strictly construed." *See Hallstrom*, 493 U.S. at 26.

There is no indication that the City provided the Secretary with the requisite 60-day notice. Instead, the City alleges that "[p]laintiffs Home Builders Association *et al.* timely provided Defendants written notice of violation in accordance with 16 U.S.C. § 1540(g)(2)(C). The claims in the City's instant action were all raised by Plaintiffs Home Builders Association *et al.*'s notice of violation and amendment thereto."

(Compl. ¶ 3.)[4] Additionally, allowing Home Builders' notice to suffice as joint notice for the City of Suisun's claims would frustrate one of the primary purposes of the notice requirement—"the facilitation of a negotiated resolution." *Idaho Sporting Congress*, 952 F. Supp. 690, 695 (D. Idaho 1996). Finally, the court's order limiting the scope of the City's claims expressly provided that the claims only cover an 88-acre parcel land owned by the City and designated as critical habitat. There is no reference to this land in plaintiffs Home Builders' notice (*see* Home Builders' Compl. Ex. 2), and therefore, even assuming that notice by proxy is permissible, Home Builders' notice would not suffice to provide the Secretary with notice of the City's claims.

Like the court in *Kern County*, this court is aware that "a strict construction of the 60-day notice requirement may appear to be inequitable and a waste of judicial resources." 2002 U.S. Dist. LEXIS 24125, at *22 (citing *Hallstrom*, 493 U.S. at 32; *Washington Trout v. McCain Foods*, Inc., 45 F.3d 1351, 1354-55 (9th Cir. 1995)). Yet, it is inescapable that, in this situation, courts "lack authority to consider the equities." *Id.* Additionally, if this court exercised jurisdiction over claims that had not been properly disclosed to and noticed before the agency, the court "would usurp the right of the applicable governmental agencies to evaluate and act upon the merits of the claims prior to judicial review." *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1144 (9th Cir.

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[4] Because the City additionally has joined in plaintiffs Home Builders' motion for summary judgment, rather than filing its own motion for summary judgment, there are no arguments before the court on the City's behalf.

2002). For these reasons, the court does not have jurisdiction to reach the merits of the arguments made by the City of Suisun in its first seven claims.[5]

B. Federal Defendants' Motion to Strike

The Federal Defendants move to strike extra-record evidence proffered by Tsakopoulos Investments and the Environmental Groups. In the Ninth Circuit, materials not present in the administrative record may be considered by a court reviewing an agency decision in only four situations: (1) when they are "necessary to determine whether the agency has considered all relevant factors and has explained its decision," (2) "when the agency has relied on documents not in the record," (3) "when supplementing the record is necessary to explain technical terms or complex subject matter," or (4) "when plaintiffs make a showing of agency bad faith." *Sw. Ctr. for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996) (internal quotations omitted). Additionally, where specific facts must be presented in the form of affidavits or other evidence to establish standing, the court will take these facts to be true for the purposes of a summary judgment motion. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *see also Nw. Envt'l Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (considering extra-record affidavits for the purpose of determining whether the plaintiffs had standing to sue).

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[5] The only remaining claim by the City of Suisun is that the critical habitat designation is void because of the FWS's failure to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370.

The court has not considered the documents submitted by Tsakopoulos Investments, as they were immaterial to the jurisdictional issues that prevented the court from reviewing Tsakopoulos Investments' first six claims, and also immaterial to the seventh claim. Therefore, the motion to strike is unnecessary as to those documents.

Additionally, the Environmental Groups submitted extra-record declarations in order to establish standing. To the extent that the declarations could be used in support of other arguments, the court has not relied upon them, and the Environmental Groups have indicated that they do not intend the declarations be used for any other purpose. Therefore, the court declines to strike these declarations.

Federal Defendants also move to strike (1) the study, "Report: Initial Assessment of Habitat Characteristics and Conservation Potential in Western Placer County," which is attached as Exhibit 3 to the Delfino Declaration, and (2) portions of the Delfino Declaration that refer to this study and lines of the environmental groups' summary judgment brief that discuss it. The Environmental Groups contend that consideration of this study is "necessary to determine whether the agency has considered all relevant factors and has explained its decision," because it demonstrates that the FWS has failed to consider the economic benefits of designating critical habitat. The court will therefore consider this extra-record evidence.

The parties also dispute whether the court can consider an article entitled "Habitat Cave-In?," which addresses an attempt by Riverside County to develop protected land and notes the effect of political considerations on a habitat conservation plan. The

court is not persuaded that an article published in the *Riverside Press-Enterprise* is "necessary" to demonstrate that FWS considered all relevant factors when it appears to be irrelevant. Therefore, the court will strike this extra-record evidence that is attached to the Environmental Groups' motion for summary judgment as Exhibit 4.

Finally, Federal Defendants move to strike the second exhibit to the Delfino Declaration, a settlement agreement that resulted in the Placer County Report, and the accompanying discussion of the circumstances that led to settlement agreement. "Federal courts may 'take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.'" *Cactus Corner, LLC v. U.S. Dept. of Agriculture*, 346 F. Supp. 2d 1075, 1092 (E.D. Cal. 2004) (quoting *United States ex rel Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)). It is unclear whether a settlement can be considered a proceeding, and it is additionally unclear that this settlement has a direct relation to the proceedings here. Therefore, the court will not take judicial notice of the settlement agreement. The court therefore grants Federal Defendants' motion to strike this report and the related discussion beginning on page 16 at line 20 of the Environmental Groups' motion for summary judgment and continuing through page 17, line 3.

C. Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact, and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Alternatively, the movant can demonstrate that the non-moving party cannot provide evidence to support an essential element upon which it will bear the burden of proof at trial. *Id.*

1. Administrative Procedure Act:

Judicial review of actions by administrative agencies is generally governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which states that a reviewing court must set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000).

This is a "deferential standard . . . designed to ensure that the agency considered all of the relevant factors and that its decision contained no clear error of judgment." *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001) (internal quotations omitted). An agency action should only be overturned when the agency "has relied on factors which Congress has not

intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)). The court must ask whether the agency considered "the relevant factors and articulated a rational connection between the facts found and the choice made." *Natural Res. Def. Council v. United States Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997).

The court is not, empowered to substitute its judgment for that of the agency. *Az. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)). Moreover, the court should review the agency's actions based on the administrative record presented by the agency. *See Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) ("When reviewing an agency decision, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") (internal quotations and citations omitted).

2. Endangered Species Act

The FWS is subject to additional regulations when it lists a species as threatened or endangered. Under § 4(a) of the Endangered Species Act ("ESA"), when the FWS lists a species, "to the maximum extent prudent

and determinable," it must also designate a critical habitat for that species. 16 U.S.C. § 1533(a)(3). "Critical habitat" refers to geographic areas that are "essential" for the conservation of the species. 16 U.S.C. § 1532(5)(A). Land is considered critical habitat when it is "a specific area within the geographical area occupied by the species" that has physical and biological features essential to conservation and that "may require special management considerations of protection." *Id.* Specific areas *outside* of the geographical area occupied the species may also be designated as critical habitat if the Secretary determines they are "essential for the conservation of the species." *Id.* In other words, critical habitat is land essential to the conservation of the species, but it includes the habitat occupied by the species as well as land on which the species cannot be found, provided the Secretary determines that land unoccupied by the species is nevertheless necessary for its conservation.

Pursuant to § 4(b)(2) of the ESA, the FWS must designate critical habitat based on the "best scientific data *available* and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). The FWS may exclude an area from critical habitat when it "determines that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat," provided exclusion will not result in the extinction of the species. *Id.* § 1533(b)(2). The FWS is prohibited from designating lands owned by the Department of Defense and subject to an integrated natural resources management plan "if the Secretary determines in writing that such a plan provides a benefit to the species. *Id.* § 1533(a)(3)(B)(i).

The FWS must publish regulations in the Federal Register regarding its critical habitat designation after a notice and comment period. *Id.* § 1533(a)(3)(A). A court reviewing the FWS's actions taken pursuant to the ESA must ask whether the agency considered "the relevant factors and articulated a rational connection between the facts found and the choice made." *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997).

3. Home Builders' Motion for Summary Judgment

Home Builders argue that, in making the critical habitat designation, the FWS: (1) failed to describe the specific areas occupied by the species within the subunits designated as critical habitat, (2) improperly included structures and other developed areas that do not contain the primary constituent elements (PCEs) essential to conservation of the fifteen species, (3) inadequately described the species' PCEs, and (4) conducted economic impact analysis without considering coextensive or cumulative impacts or explaining why certain tracts were excluded and others were included. Home Builders contends that these actions constitute violations of the ESA, the APA, and the NEPA, and that the critical impact designation should therefore be set aside.

a. Failure to Distinguish Unoccupied Habitat

Home Builders argue that the FWS did not distinguish between unoccupied and occupied habitat as required under the ESA. As noted above, there are different standards for critical habitat designation of occupied areas than for designation of unoccupied

areas. In short, there is a higher standard for critical habitat designation of areas unoccupied by the species—the Secretary must make a determination that such areas are essential to the conservation of the species. 16 U.S.C. § 1532(5)(A)(ii).

Although the FWS determined that each of the critical habitat units is occupied by the species, it admittedly included some unoccupied subsections within the critical habitat units. (Fed. Defs.' Cross-Mot. for Summ. J. 19 (citing 70 Fed. Reg. at 46,945; 68 Fed. Reg. at 46,721, 46,722-44).) The FWS recognized that some unoccupied areas were likely to have been included, defining the term "unoccupied" as "an area that contains no hatched vernal pool crustaceans or observed above-ground plants, and that is unlikely to contain a viable cyst or seed bank." 70 Fed. Reg. 46,924, 46,929; 68 Fed. Reg. at 46,715.

The FWS points out that it is difficult to distinguish between occupied and unoccupied areas due to the nature of vernal pools. Vernal pools are ephemeral in nature, and vernal pool species are characterized by their ability to remain in a dormant phase for years at a time. The size of a vernal pool also fluctuates from year to year, and in some years, the pool itself may never form. As previously discussed, vernal pools exist in clusters that are fed with water by "low drainage pathways" called swales. Thus, the FWS concluded it "cannot quantify in any meaningful way what proportion of each critical habitat unit may actually be occupied by the vernal pool crustaceans or vernal pool plants at any one time," and had likely included some unoccupied areas for that reason. *Id.*

The FWS's duty under the ESA is to make a critical habitat designation "on the basis of the best

scientific data *available*." *Id.* § 1533(b)(2) (emphasis added). Accordingly, the FWS need not conduct its own studies to improve upon existing scientific data. *Sw. Center for Biological Diversity v. Babbitt*, 342 U.S. App. D.C. 58, 215 F.3d 58, 60-61 (D.C. Cir. 2000); *see also Building Indus. Ass'n v. Norton*, 345 U.S. App. D.C. 426, 247 F.3d 1241, 1246 (D.C. Cir. 2001) ("the Service must utilize the 'best scientific . . . data available,' not the best scientific data possible" (quoting § 1533(b)(1)(A))). Moreover, the FWS was required to publish its critical habitat designation concurrently with the regulation listing the species as threatened or endangered, or, if critical habitat was not determinable at the time of listing, no later than a year after the listing of the species. 16 U.S.C. § 1533(b)(6)(C)(ii). Even if the FWS delays its critical habitat designation for a year, the designation should then be made "based on such data as may be available at that time." *Id.* Moreover, "[t]he designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances." *Natural Res. Def. Council v. U.S. Dept. of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (quoting *N. Spotted Owl v. Lujan*, 758 F.Supp. 621, 626 (W.D. Wash. 1991)). Thus, because of the statutory constraints the FWS faced and the unique characteristics of vernal pools and the species that inhabit them, the FWS appropriately made its critical habitat designation in a manner consistent with the scientific evidence available.

The significance of Home Builders' argument is that the FWS may not have properly designated habitat because it did not precisely follow the statutory definition. However, the distinction between the two types of habitat is that unoccupied habitat must be

more carefully designated. *Cape Hatteras Access Pres. Alliance v. U.S. DOI*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("[B]oth occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential."). Given the difficulty in determining whether a particular habitat is occupied or unoccupied by a vernal pool species, the FWS reasonably determined whether habitat was critical according to the more exacting of the two standards.

Moreover, there is theoretically no limit to the degree of precision agencies could be compelled to undergo before designating critical habitat under Home Builders' argument. Within a critical habitat unit, it is entirely possible that a single square inch of the land at issue would be wholly unoccupied by the relevant species. Clearly, an agency should not have to make a critical habitat determination on such a fine scale, but the logical extension of Home Builders' argument would seem to impose just such a requirement on the agency. Therefore, the critical habitat designation will pass muster regardless of whether the habitat designated was occupied or unoccupied.[6] The court will defer to the agency's

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[6] Home Builders argue that at some points the FWS described critical habitat units as "important," "unique," or "unusual," instead of as "essential." (Home Builders' Mot. for Summ. J. 25.) However, the FWS' variation in word choice does not change the fact that the FWS did determine that each of the critical habitat units was essential to the conservation of the species. *See* 68 Fed. Reg. at 46,715-16 ("[W]e determined that all currently known extant occurrences of the 11 vernal pool plants and 2 of the 4 vernal pool crustaceans (Conservancy fairy shrimp and longhorn fairy shrimp) are *essential* to the conservation of the species, due

(continued...)

reasonable judgment on this issue, and finds that the fact that the FWS did not expressly delineate which portions of the habitat were occupied and which portions were unoccupied does not constitute a violation of the ESA.

b. Failure to Adequately Identify PCEs

For occupied critical habitats, the FWS is required to identify "physical or biological features essential to the conservation of the species," that "may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). In FWS regulations, the "physical and biological features" are also referred to as "primary constituent elements" or "PCEs" of the critical habitat. 50 C.F.R. § 424.12(b)(5). Home Builders argue that the PCEs identified by the FWS are inadequate and are not described with sufficient particularity.

The PCEs listed by the FWS for the Conservancy fairy shrimp in its August, 2005 final rule are:

> (i) Topographic features characterized by mounds and swales, and depressions within a matrix of surrounding uplands that result in complexes of continuously, or intermittently, flowing surface water in the swales connecting the pools described in PCE

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[6] (...continued)
to their limited geographic and ecological distributions (criteria 1 and 2), low overall number of populations (criterion 1), and the seriousness of the threats posed to remaining populations, including fragmentation of habitat. For the other two vernal pool crustaceans (vernal pool fairy shrimp and vernal pool tadpole shrimp), we were able to meet the criteria listed above without designating all occupied areas . . . ." (emphasis added)).

(ii), providing for dispersal and promoting hydroperiods of adequate length in the pools.

(ii) Depressional features including isolated vernal pools with underlying restrictive soil layers that become inundated during winter rains and that continuously hold water for a minimum of 19 days (Helm 1998), in all but the driest years; thereby providing adequate water for incubation, maturation, and reproduction. As these features are inundated on a seasonal basis, they do not promote the development of obligate wetland vegetation habitats typical of permanently flooded emergent wetlands.

(iii) Sources of food, expected to be detritus occurring in the pools, contributed by overland flow from the pools' watershed, or the results of biological processes within the pools themselves, such as single-celled bacteria, algae, and dead organic matter, to provide for feeding.

(iv) Structure within the pools described in PCE (ii), consisting of organic and inorganic materials, such as living and dead plants from plant species adapted to seasonally inundated environments, rocks, and other inorganic debris that may be washed, blown, or otherwise transported into the pools, that provide shelter.

70 Fed. Reg. at 46,934-35. The only difference between this PCE and the PCEs of the remaining three vernal pool crustaceans is the minimum number of days the vernal pool must be filled with water in all but the

driest years, as described in section (ii). *Id.* at 46,934-37. The PCEs for the eleven plants are similar to sections (i) and (ii) above, and are identical to each other. *Id.* at 46,937-42. According to the relevant federal regulations, "[p]rimary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types." 50 C.F.R. § 424.12. The PCEs chosen by the FWS describe the seasonal character of the pools, the shelter they provide for crustacean species, their underlying soil and the manner of formation, and also note that the pools themselves are sites where the species feed, reproduce, and mature.

Home Builders argue that the identification of a "matrix of surrounding uplands" necessary for the periodic flow of water into the pools is not sufficiently specific.[7] In particular, they contend that there is no

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[7] Home Builders additionally contend that the FWS's definitions would allow land with only one PCE to be designated as critical habitat, citing the following language in the August, 2005 Final Rule: "PCEs described for each species do not have to occur simultaneously within a unit for the unit to constitute critical habitat for any of the 15 vernal pool species." Home Builders argue that a PCE cannot be "essential" for species conservation if it need not be present in a given critical habitat.

However, as discussed in the text, vernal pools must be fed by upland areas, and the first PCE describes "[t]opographic features characterized by mounts and swales, and depressions within a matrix of surrounding uplands that result in complexes of continuously, or intermittently, flowing surface water in the swales connecting the pools." These upland areas may not be occupied by the species, and may not contain a vernal pool,

(continued...)

indication of the size of the uplands or the mounds or swales they contain, and no explanation of what kind of food in the form of detritus would be acceptable. Home Builders cite other situations in which the FWS has provided limits on uplands essential to the conservation of other species, including the California tiger salamander and the California red-legged frog. (Pls. 'Home Builders' Mot. for Summ. J. 15.) As the Federal Defendants note, however, in both of these instances, the FWS placed limitations on the upland habitat based on the available scientific evidence. *See* 70 Fed. Reg. 74,138, 74,146-47 (Dec. 14, 2005) (circumscribing the tiger salamander's upland range because "[t]tle only known study we are aware of that specifically investigated movement of California tiger salamanders between breeding ponds projected that 0.70 mi (1.1 km) would encompass 99 percent of interpond dispersal"); 70 Fed. Reg. 66,906, 66,912 (Nov. 3, 2005) (delimiting "[u]pland habitat that contains the features essential to the conservation of the species" to 200 feet surrounding the aquatic

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[7] (...continued)
although they may be linked to one or several. Regardless of whether they contain a vernal pool, or other PCEs, they are still essential to the conservation of the 15 vernal pool species.

Home Builders simply pose hypotheticals suggesting that a plain of uplands unconnected to a vernal pool or a "homeowner's backyard studded with bits of 'inorganic debris'" may constitute a critical habitat under this definition. The PCEs are sufficiently specific to preclude such an outcome—the first PCE describes a matrix of uplands that result in water that flows to pools, and the fourth PCE requires structure within the pools consisting of organic and inorganic materials. Moreover, Home Builders'do not present scientific data to the contrary, and when prompted to do so during oral argument, counsel for Home Builders could not explain how vernal pools could be better described in light of the evidence available.

habitat "based on the, dispersal capabilities of the subspecies" and on two studies that indicated that the subspecies could inhabit upland habitats in a 200 foot radius of the aquatic habitats for between twenty and seventy-seven days).

By contrast, Home Builders do not reference scientific data with regard to the species or PCEs in this case that the FWS should have considered and disregarded. *See Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1081 (9th Cir. 2006) (concluding that a plaintiff's argument that the FWS failed to rely on the best scientific data available was insufficient because the plaintiff "point[ed] to no data that was omitted from consideration," and "absent superior data . . . occasional imperfections do not violate § 1533(b)(1)(A)" (quoting *Building Indus. Ass'n of Superior Cal. v. Norton*, 345 U.S. App. D.C. 426, 247 F.3d 1241, 1246 (D.C. Cir. 2001)) (modification removed)). The scientific evidence the agency relied on merely indicated that uplands and detritus are crucial to the survival of the species, but did not indicate the size of the uplands or the kinds of detritus necessary. *See, e.g.*, 70 Fed. Reg. at 46,924-25 ("Upland areas associated with vernal pools are also an important source of nutrients to vernal pool organisms (Eriksen and Belk 1999; Wetzel 1975).

Vernal pool habitats derive most of their nutrients from detritus (decaying matter) washed into pools from adjacent uplands, and these nutrients provide the foundation for a vernal pool aquatic community's food chain. Detritus (both living and dead organic matter) is a primary food source for the vernal pool crustaceans addressed in this rule (Eriksen and Belk 1999)."); 68 Fed. Reg. at 46,704 (noting that the matrix of

surrounding uplands "contribute to the filling and drying of the vernal pool, maintain suitable periods of pool inundation, and maintain water quality and soil moisture to enable the 15 vernal pool species to carry out their lifecycles."); 68 Fed. Reg. at 46,688 ("Fairy shrimp are filter feeders, and consume algae, bacteria, protozoa, rotifers, and bits of detritus as they move through the water."). Thus, the FWS's description of these PCEs is reasonably specific, and the court has no cause to disturb the agency's finding.

Home Builders additionally argue that the length of the hydroperiods are insufficiently identified, but do not present scientific evidence that the FWS neglected to consider. (Home Builders' Mot. for Summ. J. 15.) Under element (ii), the pools must be inundated for different amounts of time, depending on the species, ranging from eighteen to forty-one days. As described in the PCEs themselves, the length of time the pools are inundated is an element necessary to ensure "vernal pool crustacean hatching, growth, and reproduction," during at least some years. The amount of time required for these activities varies by species. *See* 70 Fed. Reg. at 46,934-36 (tailoring the hydroperiod length to the minimum maturation times for fairy shrimp based on a 1998 study). Moreover, the amount of annual precipitation in the Mediterranean climates where vernal pools are found fluctuates from year to year. 67 Fed. Reg. at 59,885. Thus, as with the elements of the PCEs in general, the FWS's determination of this PCE is based upon scientific evidence, and Home Builders' arguments to the

contrary are unpersuasive because they have no scientific basis.[8]

c. Failure to Identify the Point at which Conservation will be Achieved

Home Builders contend that because the FWS has not determined when the protected species will be deemed conserved, the FWS is unable to make a determination as to what PCEs are essential to the conservation of the species. In support of this argument, Home Builders rely on *Home Builders Ass'n of N. Cal. v. FWS ("HBANC")*, 268 F. Supp. 2d 1197, 1214 (E.D. Cal. 2003), in which Judge Ishii concluded that "if the Service has not determined at what point the protections of the ESA will no longer be necessary for the [conservation of the listed species], it cannot possibly identify the physical or biological features that are an indispensable part of bringing the [species] to that point." The court in *HBANC* did not cite any caselaw for this proposition and instead arrived at it through the application of logic. After examining the statutory provisions of the ESA, this court is

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[8] Additionally, Home Builders contend that elements (i) and (ii) of the PCEs are contradictory—element (i) describes "complexes of continuously or intermittently flowing surface water in the swales connecting the pools," whereas element (ii) denotes vernal pools that are inundated only seasonally. This argument is largely semantic. Swales are "shallow drainages that carry water seasonally," but they may "remain saturated for much of the wet season." 68 Fed. Reg. at 46,685. It is entirely reasonable to describe a drainage that is continuously saturated during a particular time of year as having "continuously flowing surface water" at that time. Therefore, the court is not persuaded that this superficial inconsistency renders the description of the PCEs unreasonable.

unpersuaded by the logic in *HBANC*, and will therefore take a different approach.

PCEs are simply "physical or biological features essential to the conservation of the species" that "may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(1). It is true that a PCE described in a critical habitat designation must be "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). Further, under the ESA, "the terms 'conserve', 'conserving', and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C.A. § 1532. Although PCEs must be described in a critical habitat designation, there is no indication in the ESA that the agency must simultaneously prepare objective, measurable criteria indicating when the ultimate goal of conservation of the species will be achieved.

By contrast, the subsections of the ESA relating to the development of recovery plans do contain such a requirement:

> The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species . . . The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable—
>
> . . . .
>
> (B) incorporate in each plan—

> (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
>
> (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list
>
> . . . .

16 U.S.C. § 1533(f)(1). Thus, in the context of recovery plans, the ESA contains a requirement that the FWS incorporate in their recovery plan the objective, measurable criteria that will indicate when conservation has been achieved. The lack of a similar provision in the context of critical habitat designation indicates that Congress did not intend to require conservation criteria to be determined at that stage or in that context. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404, 111 S. Ct. 840, 112 L. Ed. 2d 919 (1991) (stating that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)). Thus, Home Builders' argument appears to be inconsistent with Congressional intent.[9]

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[9] Moreover, a Draft Recovery Plan prepared by the FWS in October, 2004, does contain a section devoted to "Recovery Criteria." This section denotes species-specific recovery criteria, (continued...)

Additionally, it not clear why the determination of the point at which conservation will be achieved is necessary to identify the elements of a habitat that are essential to conservation of the species. An element of the environment that is necessary to the survival of a species, such as food, shelter, or any necessary condition for its habitat to exist, would be essential to conservation of the species regardless of when or if conservation is achieved. Simply put, if the food a species needs to survive was not present in a particular area, the goal of conserving that species in that area would be unattainable.[10] Therefore, the court must disagree with the conclusion in *HBANC* and will not require the FWS to have determined the point at which conservation of the vernal pool species would be achieved.

d. Failure to Adequately Identify the Specific Areas within the Geographic Area Occupied by the Species Where the Essential Physical or Biological Features are Found

Home Builders argue that the FWS improperly designated critical habitat by including areas that do not contain the essential physical or biological features

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[9] (...continued)
including criteria related to species occurrence and habitat protection, reintroduction, and seed banking. (Supp. to the Admin. Record (Documents Cited in the Admin. Record), Draft Recovery Plan at 111-84 through 111-113 (October, 2004).)

[10] Home Builders make this point themselves, although in the context of a different argument. They note, "[i]t does not require a science degree to recognize that no species can survive without food . . . . How will these species survive, let alone recover, without food?" (Home Builders' Mot. Summ. J. 19.)

for the species. The FWS admittedly did not exclude every developed area within the critical habitat designation, although it "made every effort to avoid designating developed areas such as buildings, paved areas, boat ramps, and other structures that lack the PCEs for the 15 vernal pool species." 70 Fed. Reg. at 46,930. To this, Home Builders responds that relying upon Section 7 consultations to resolve the issue improperly delays the critical habitat designation.[11] However, the FWS also noted that any structures inadvertently left inside the critical habitat designation would not be subject to Section 7 consultation unless they had some effect on the species or PCEs. *Id.* ("Any such structures inadvertently left inside critical habitat boundaries are not considered part of the unit . . . [and] would not trigger section 7 consultations.").

Because of the exhaustive methods used by the FWS to designate critical habitat, and Home Builders' silence on whether there would be another method to obtain a more precisely delineated critical habitat, the court cannot conclude that the agency's actions were unreasonable or an abuse of discretion. The FWS initially used a computer program that evaluated Geographic Information System data from governmental agencies, as well as private sources. 68

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[11] "For any federal action that may affect a threatened or endangered species (or its habitat), the agency contemplating the action [] must consult with the consulting agency . . . ." *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1063 (9th Cir. 2004). The purpose of the consultation is to ensure that the federal action is unlikely to jeopardize the continued existence of the species and will not result in the destruction or adverse modification of the critical habitat designated for the species. *Id.*

Fed. Reg. at 46,713.[12] The following information was included in the Geographic Information System data: (1) current and historical species locations obtained from the California Natural Diversity Database, (2) maps of vernal pool grassland habitats, and (3) published species occurrence data in the FWS's possession. *Id.* These data were mapped[13] onto satellite aerial photography for the vernal pool regions that had been identified in the relevant scientific literature. *Id.*

Following an initial determination of the areas derived from these data, the FWS refined their maps using satellite imagery, watershed boundaries, geological information, elevational modeling data, soil type information, vegetation/land cover data, and agricultural and urban land use data. *Id.* They refined the areas selected by eliminating areas that did not have the appropriate plant species and developed areas that did not contain the PCEs. *Id.* After publication of the September 24, 2002, proposed rule and a notice and comment period, the FWS evaluated its proposed critical habitat units once more based on information it had received. *Id.* This included information from local experts regarding the vernal pool habitats and species, detailed aerial photography

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[12] The FWS explained their procedures for designating critical habitat in the August, 2003 and August, 2005 rules, and the Federal Defendants concisely reiterate these procedures in their motion for summary judgment.

[13] The FWS generated legal descriptions of critical habitat units on Universal Transverse Mercator gridlines set every 328 feet, based on the implementing regulations of the ESA, which require the agency to use "reference points and lines as found on standard topographic maps of the area." 68 Fed. Reg. at 46,704; 50 C.F.R. § 424.12(c).

sent in by county planning departments, computer-generated images of aerial photographs manipulated to have the geometric properties of a map, and in-person examinations of various locations. *Id.* The FWS used additional data from the Geographic Information System, including local data sets for specific areas; topographical information from the U.S. Geological Society; and smaller scale mapping efforts from regional entities. *Id.* Yet the FWS recognized that even this effort would not produce a perfect result, and that some developed areas would have inadvertently been incorporated into the critical habitat units. 70 Fed. Reg. at 46,930, 46,943.

Arguing that the FWS did not sufficiently specify the boundaries of the designation, Home Builders cites *HBANC* for the proposition that a critical habitat designation that includes "buildings, roads, canals, railroads, and large bodies of water" that do not contain "habitat components" or "one or more of the primary constituent elements" is an improper designation. 268 F. Supp. 2d at 1216. In *HBANC*, however, the defendants simply relied on the fact that section 7 consultation would not occur on developed areas, and argued that plaintiffs were seeking "an impracticable level of certainty in regard to the designation of the critical habitat." *Id.*

Federal Defendants, by contrast, have expressly described the careful procedures by which they determined what land constitutes critical habitat and sought to avoid designating developed areas as critical habitat. They simply have conceded that their methods are likely to be somewhat fallible, and Home Builders have taken that admission to mean more than it does. The court cannot conceive of additional

methods that the Federal Defendants could have reasonably undertaken to attain a higher degree of precision in their critical habitat designation, and Home Builders have not described any alternatives that would improve the designation.[14] For these reasons, the court finds that the FWS adequately identified the critical habitat units.[15]

e. Improper Economic Impact Analysis

The ESA provides that, "The Secretary shall designate critical habitat... after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The Secretary "may exclude any area from critical habitat" if "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . . ." *Id.* The ESA thus provides a standard by which to measure an agency's choice to exclude an area based on economic or other

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[14] As its sole alternative proposal, Home Builders indicates that Caltrans provided information regarding transportation rights-of-ways that should be excluded, and the FWS noted that it "did not have the time, resources, or appropriate GIS data layers to segregate these areas from adjacent vernal pool habitat . . . ." 68 Fed. Reg. at 46,698. Although such a situation is clearly not ideal, the court cannot say from this evidence that the agency's determination was arbitrary or capricious.

[15] Additionally, Home Builders contend that the FWS must separately identify the geographical area occupied by the species prior to designating critical habitat. Home Builders cites no authority for this requirement, aside from Webster's Third New International Dictionary and its own reading of the statute. For the reasons discussed in the text, the court concludes that the FWS did not make its critical habitat determination in an arbitrary or capricious manner, and this unsupported argument does not disturb the court's conclusion.

considerations. The agency's decision to exclude is not mandatory, but permissive.

As the Federal Defendants point out, the legislative history of the statute confirms this reading, and clarifies that the Secretary "is not required to give economics or any other 'relevant impact' predominant consideration in his specification of critical impact . . . . The consideration and weight to be given to any particular impact is completely within the Secretary's discretion." H.R. Rep. No. 95-1625, at 16-17 (1978), 1978 U.S.C.A.N. 9453, 9466-67. Where there are no substantive standards by which a court can review an agency's action, that action is committed to agency discretion. *See Selman v. United States*, 941 F.2d 1060, 1063-64 (10th Cir. 1991). Here, the court has no substantive standards by which to review the FWS's decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion. Thus, to the extent that any of Home Builders' arguments relate to the FWS's decisions not to exclude tracts, the court will not consider them.[16]

Home Builders also argue that the FWS erred by using a methodology contrary to the Tenth Circuit's guidance in *New Mexico Cattle Growers v. U.S. Fish &*

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[16] Home Builders argue that, based on the Federal Defendants' concession that the critical habitat designation inadvertently included some developed areas, the economic benefits of designation are overstated and the cost-benefit analysis is flawed. As discussed, *supra*, it is unclear how the FWS could have avoided the inclusion of some developed areas in its critical habitat designation, and the court cannot say that consideration of some area inadvertently included in the critical habitat designation led to an economic analysis that was arbitrary, capricious, or contrary to law.

Wildlife Service, 248 F.3d 1277, 1285 (10th Cir. 2001). *New Mexico Cattle Growers* requires that, to evaluate a critical habitat designation, an agency must take into account "all of the economic impacts of a critical habitat designation regardless of whether those impacts are attributable co-extensively to other causes." *Id.* at 1284-85. In other words, the FWS must consider *both* the economic impact of the critical habitat designation itself *and* the economic impact of listing a species. *Id.*

The FWS expressly indicated that it followed the guidance provided by the Tenth Circuit in *Cattle Growers*, and that its "draft economic analysis estimates the total cost of species conservation activities without subtracting the impact of pre-existing baseline regulations (*i.e.*, the cost estimates are fully co-extensive)." 70 Fed. Reg. at 46928. Moreover, to estimate the potential economic impact of the critical habitat designation, the FWS retained a consulting firm, CRA International. CRA International projected the economic effects that would occur in the census tracts affected by the designation, *above and beyond* the baseline of the existing regulatory and economic burden landowners and managers currently bear. (Admin R., Vol. 2, Doc. 358 at 45-46.) CRA International also determined the administrative costs that would be associated with Section 7 consultations, which were the primary impacts expected. (*Id.* at 10, 44.) CRA International considered costs attributable to the jeopardy standard (relating to the listing of a species) and costs due to the adverse modification standard (relating to the designation of critical habitat). (*Id.* at 10.) Because the vernal pool species occupy the critical habitat, it was "difficult [to] mak[e] a credible distinction between

listing and critical habitat effects within critical habitat boundaries." (*Id.*) Thus, CRA determined that "[t]he administrative costs of these consultations, along with the costs of project modifications resulting from these consultations, represent compliance costs associated with the listing of the species *and* the designation of critical habitat." (*Id.* at 10, 44.) Therefore, this analysis clearly considers the co-extensive costs.[17]

Relatedly, Home Builders argue that the FWS's exclusion of twenty-three census tracts was erroneous because the FWS did not explain the basis for its decision to exclude only twenty-three of 158 tracts, and because the FWS failed to consider the relative costs of the negative economic impacts, based on the

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[17] Although the FWS expressly indicated in its analysis that it took into account both the economic impact of listing the species and the economic impact of the critical habitat designation, *see* Admin. R. at 17022653 (Economic Impacts of Critical Habitat Designation for Vernal Pool Species (June 2005) at 7), Home Builders argue that other portions of the report imply otherwise. In particular, Home Builders note that the analysis makes mention of only critical habitat designation, and not listing a species, in two separate places. *See id.* at 17022697 ("If such effects would not have occurred in the absence of critical habitat (i.e., "but for" critical habitat), then they are considered by this analysis to be an impact of the designation."); *id.* at 17022698 ("To the extent that delays result from the designation, they are considered in the analysis.").

It does not follow from these sentences that the FWS did not consider the economic impact of listing a species, and the court is not persuaded that it should infer from these minor omissions that the FWS has mischaracterized its analysis in a more favorable light. The same reasoning also applies to Home Builders' suspicions that, despite its statements to the contrary, the FWS did not consider costs associated with Sections 9 and 10. (*See* Home Builders' Mot. for Summ. J. 34.)

socioeconomic profile of each individual tract. Significantly, the Congressional record indicates that "[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion." H.R. Rep. No. 95-1625, at 16-17 (1978), 1978 U.S.C.C.A.N. at 9466-67.

The FWS took into account the co-extensive costs previously discussed, and determined that the estimated cost of the designation was $ 965 million over the next 20 years, due to the "opportunity costs associated with the commitment of resources required to accomplish species and habitat conservation." *Id.* at 10, 47-53. Based on the weighing of these costs, the FWS excluded twenty-three census tracts from the final critical habitat designation. The FWS decided to exclude twenty-three tracts because they would result in the potential avoidance of approximately eighty percent of the potential costs of critical habitat designation, and would not result in extinction of a species. 70 Fed. Reg. at 46,948-52. More specifically, the FWS determined that by excluding the 20 areas that would suffer the greatest economic loss if designated as critical habitat (alternatively, twenty-five percent of the critical habitat), it could avoid approximately 80 percent of the total costs. 70 Fed. Reg. at 37740. Thus, the FWS rationally excluded the twenty tracts projected to have the most detrimental economic impact. This decision clearly involved weighing the benefits and costs of exclusion, and this is the type of decision to which this court must defer.

The FWS also excluded three additional tracts, a tract in Merced county associated with the construction of the University of California at Merced

that would have suffered a $10 million impact, a tract in Tehama county that would suffer a $6 million impact because of an ongoing transportation project, and a tract in Placer county adjacent to another excluded tract because a development plan extending over both tracts would result in a significant portion of the growth projected to occur in the area. 70 Fed. Reg. at 46,948-52.[18]

Although the FWS did provide a logical reason for the exclusion of the twenty most-impacted tracts, the explanation provided for two of the three additional tracts that were excluded is inadequate. In its final rule, issued on August 11, 2005, the FWS noted as follows:

> As we finalized the economic analysis, we identified high costs associated with the critical habitat designation to public projects in Tehama and Merced County. These public projects were the development of the UC Merced Campus and the widening of Highway 99 in Tehama County. The final economic analysis indicates additional costs

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[18] The court notes that this choice did take into consideration, to some degree, the relative harm that the individual tracts would suffer based on their socioeconomic profiles. Among the twenty-three census tracts ultimately excluded are eleven of the twelve counties that were projected to suffer the highest impact relative to aggregate household income. 70 Fed. Reg. at 46, 949-50. Moreover, to the extent Home Builders' argument that the agency should have considered the relative impact of the economic costs is a disagreement with the methodology used by FWS, "[m]ere disagreement with an agency's policies, methodologies, and conclusions does not render the decision arbitrary and capricious." *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1070-71 (D. Ariz. 2001).

> in census tracts in which these projects were located were $ 10,000,000 for UC Merced and $ 6,093,965 for Highway 99. *On the basis of the significance of these costs*, we determined that these two census tracts also should be excluded. In addition, information received during the comment period indicated that the Placer Vineyards Specific Plan was located in two census tracts in Placer County, one of which was identified in the Draft Economic Analysis as being in one of the 20 highest cost areas, and one of which was not. As a result, impacts for the two affected census tracts were aggregated in the final analysis, which significantly increased the costs in the second census tract. For this reason, it too, is being excluded from the final critical habitat designation.

70 Fed. Reg. at 46,950.

Thus, as to the University of California at Merced and Tehama county tracts, the FWS merely highlighted the monetary benefit to excluding these tracts, and provided no additional explanation. There is no indication that these two tracts are among the twenty-two most impacted tracts. The FWS simply concludes that the high cost of inclusion justifies exclusion, without making a relative comparison amongst all tracts. This appears to be inconsistent with the rest of the logic employed by the FWS in its exclusion analysis. Thus, the two tracts relating to public works projects that were excluded as the FWS "finalized the economic analysis" appear to have been excluded arbitrarily. "The agency is obligated to 'articulate[] a rational connection between the facts

found and the choices made.'" *Pac. Coast Fed'n of Fishermen's Assocs. v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005) (quoting *NRDC v. Dep't of Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997)). Because the FWS failed to do so adequately with respect to these two tracts, the court concludes that their exclusion should be set aside.

However, the FWS did articulate a reason for excluding an additional tract in Placer county because of a development plan that encompassed that tract and would result in a significant portion of growth in the area. The FWS's exclusion of the twenty most-impacted tracts depended in part upon a development project that extended past one of those twenty tracts and into another tract that was not excluded. The FWS noted that "[s]ince a single development accounts for a significant fraction of growth in this area, segregating impacts by Census Tract may be artificial. Thus, impacts for tracts 06061020902 and 06061021301 are aggregated in the final analysis." 70 Fed. Reg. at 46,931. The FWS logically excluded this tract in order to maintain the remainder of the exclusions, and the court cannot conclude that this additional exclusion was arbitrary and capricious.

f. NEPA Violation

Home Builders and the City of Suisun contend that the FWS violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370, by failing to prepare an Environmental Impact Statement or an Environmental Assessment for its critical habitat designation. NEPA is "our basic national charter for protection of the environment . . . . [I]t establishes policy, sets goals . . . and provides means for carrying

out the policy." 40 C.F.R. § 1500.1(a). NEPA requires that an Environmental Impact Statement be prepared for all "major Federal actions significantly affecting the quality of the human environment." *Id.* (quoting 42 U.S.C. § 4332(C)). However, the Federal Defendants point out, and plaintiffs Home Builders concede (Pls. Home Builders' Mot. for Summ. J. 42-43),[19] that there is binding Ninth Circuit authority that precludes a challenge under NEPA for a critical habitat designation made pursuant to the ESA. In *Douglas County v. Babbitt*, the Ninth Circuit found that

> NEPA does not apply to the Secretary's decision to designate a habitat for an endangered or threatened species under the ESA because (1) Congress intended that the ESA critical habit procedures displace the NEPA requirements, (2) NEPA does not apply to actions that do not change the physical environment, and (3) to apply NEPA to the ESA would further the purposes of neither statute.

48 F.3d 1495, 1507-08 (9th Cir. 1995). Accordingly, plaintiffs Home Builders' arguments that the FWS should have complied with the requirements of NEPA fail as a matter of law.

4. Environmental Groups' Motion for Summary Judgment

The Environmental Groups argue that the FWS's cost-benefit analysis was flawed because the agency improperly weighed excessive economic costs against inadequately-determined benefits, and improperly

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[19] Plaintiffs Home Builders have made this argument in order to preserve their right to challenge *Douglas County* on appeal.

made non-economic exclusions to the Carrizo Plain National Monument, National Wildlife Refuges, lands subject to Habitat Conservation Plans, and lands subject to other management plans.

a. Data Regarding Economic Benefits

The Environmental Groups make several arguments regarding the arbitrariness of the FWS's cost and benefit calculations with regard to critical habitat designation. Pursuant to § 4(b)(2) of the ESA, the FWS has a mandatory duty to consider the economic and other impacts of a critical habitat designation using the "best scientific data available." 16 U.S.C. § 1533(b)(2). There are no express provisions in the ESA regarding what "economic impact" means, and nothing is mentioned about "economic benefits." *See* 16 U.S.C. § 1533. This court has previously explained that "it stands to reason that in order to consider the economic impact, defendants must consider both the positive and negative impact." *Butte Environ.*, No. 04-0096, at 12. The court also indicated that it was unaware of any authority that explains *how* to consider economic impact or that specifically requires that the economic benefits of designation be quantified. *Id.*

The FWS concluded that expressing benefits in economic terms was prohibitively difficult, noting that the benefits of designation "reflect broader social values, which are not the same as economic impacts." (Admin. R. Vol. 2 at 17021468.) The FWS therefore determined that "the benefits of critical habitat designation are best expressed in biological terms." (Admin. R. 05008574; 17022691.) The FWS further explained this conclusion in their August, 2003 Final Rule, in which they indicated that "it is not feasible to

fully describe and accurately quantify the benefits of this designation in the context of this economic analysis," and additionally that "no studies have addressed the non-use values associated with endangered vernal pool species. Thus, it is not possible to develop a monetary measure of this category of benefit." (*Id.* Vol. I at 05008400.)[20] FWS also noted that, "[s]ufficient information does not exist to allow for quantification of the secondary benefits of habitat protection . . . ." (*Id.* at 05008405.)

The Environmental Groups argue to the contrary that there was available data regarding the quantification of benefits, and that the FWS ignored or even buried such data. One example they provide is the proposed methodologies that economists submitted that could be used to quantify benefits. Thus, the Environmental Groups would have the FWS conduct an independent study into the quantification of benefits. Notably, however, "[t]he 'best available data' requirement makes it clear that the Secretary has no obligation to conduct independent studies." *Sw. Ctr.*, 215 F.3d at 60-61 (reversing and remanding a district court's determination requiring the FWS to generate better data by conducting a species population count). Significantly, other than the benefits provided by mitigation lands, the Environmental Groups have not identified any specific type of benefit to be measured. They additionally cite the review of CRA's analysis by a leading academic in the field of urban economics, Professor John M. Quigley at the University of

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[20] The Environmental Groups cite this draft economic impact analysis as an example of an attempt to quantify benefits. As demonstrated by the parts of the draft report quoted in the text, it is not clear that the attempt to quantify benefits was successful.

California at Berkeley, who stated that "[n]owhere in the analytical paradigm for this work by CRA is there reference to the benefits of habitat protection." (Admin. R. Vol. 2 (Doc. 631).) Professor Quigley additionally acknowledged that such benefits are difficult to measure, but did not indicate how to measure them. *Id.* Professor Quigley further indicated that he found the analysis more generally to be "an impressive piece of work," especially "[g]iven the inherent limitations in theory and data, and the difficulties of translating these regulations into specific changes in economic outcomes over space." (*Id.* (Doc. 630).) It may well be that scientific data regarding other types of habitats would allow for the consideration of the economic benefits of a critical habitat designation. In fact, advances in scientific knowledge about vernal pool habitats may make it possible to quantify the economic benefits related to preservation of these habitats at some point in the future. Nevertheless, from the evidence before it, the court concludes that the FWS's determination that benefits would not be measured in terms of their strict economic value appears to be reasonable, and does not invalidate their evaluation of economic impacts.[21]

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[21] The Environmental Groups also cite extra-record evidence regarding a talk on June 8, 2006, by the author of the analysis prepared by CRA International. However, the court is limited to evidence in the administrative record at the time the decision was made, unless the party seeking to introduce the extra-record evidence demonstrates that it falls under an exception to the general rule. (*See* Motion to Strike analysis, *supra*.) The Environmental Groups have not made that argument here, and the court will not consider this evidence.

Additionally, the Environmental Groups' arguments regarding settlement discussions around the economic value of mitigation

(continued...)

The Environmental Groups further argue that, in its estimate of the costs of critical habitat designation, the FWS improperly included the economic costs of multiple conservation measures (referred to as a "co-extensive analysis") applicable to the fifteen vernal pool species, rather than just the costs of the critical habitat designation. As previously mentioned, the ESA does not dictate how the FWS should conduct its economic impact analysis. *See* 16 U.S.C. § 1533(b)(2). In deciding to conduct its co-extensive analysis, the FWS relied on the Tenth Circuit's decision in *Cattle Growers*, 248 F.3d at 1285.[22]

The Environmental Groups argue that the FWS wrongly relied upon *Cattle Growers*, which they contend was a hard case making bad law, and failed to take adequate account of a relevant Ninth Circuit decision, *Gifford Pinchot*, 378 F.3d at 1063.[23] In *Gifford Pinchot*, the Ninth Circuit rejected FWS's regulatory definition of "destruction or adverse modification" for lowering the standard for critical

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[21] (...continued)
lands are not the proper subject of judicial notice, as discussed *supra*, and will not be considered by the court.

[22] The court's prior analysis with regard to Home Builders' arguments that the FWS did not rely on *Cattle Growers* is also instructive here. To the extent that the FWS relied on *Cattle Growers* and neglected to consider the effects of the critical habitat designation on species' recovery, pursuant to *Gifford Pinchot*, the critical habitat designation is not consistent with applicable Ninth Circuit precedent.

[23] *See Cape Hatteras Access Pres. Alliance*, 344 F. Supp. 2d 108, 130 (D.D.C. 2004) (noting that *Cattle Growers* was "an instance of a hard case making bad law," and examining the inconsistency between *Cattle Growers* and *Gifford Pinchot*).

habitat designation, which requires consideration of promoting *recovery* of the species rather than simply ensuring its survival. The concern in *Gifford Pinchot* was that the FWS's definition with respect to critical habitats effectively "read out" of the statute the limitations in place with respect to listing a species. 378 F.3d at 1069-70.

In *Gifford Pinchot*, the Ninth Circuit concluded that the FWS had erred by promulgating a regulation defining "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for *both* the survival *and* recovery of a listed species." *Id.* (citing 50 C.F.R. § 402.02). The court noted that this regulation allowed changes to the critical habitat designation in a manner that effectively ignores the recovery requirement, because a modification that affects a species' survival does greater damage to the species than a modification that would merely affect the species' ability to recover. "Because it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for species survival, the regulation's singular focus becomes 'survival.'" *Gifford Pinchot*, 378 F.3d at 1069. However, the "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery." *Id.* at 1070. Accordingly, the court held that this regulation was impermissible. *Id.* at 1071.

Thus, the biological opinions at issue in *Gifford Pinchot* evaluated only whether the proposed modifications to critical habitat would impede the more dire of the two goals—survival of the species—and ignored whether the proposed modifications would

affect the goal of fostering recovery of the species. *Id.* at 1070-71. Additionally, the Ninth Circuit noted that an agency is afforded a presumption of regularity, meaning that it is presumed to have followed its own regulations, absent evidence to the contrary. *Id.* at 1072 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) (*overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977))). Because there was no evidence in the record to rebut the presumption that the FWS had followed its flawed regulation, the Ninth Circuit invalidated the biological opinions issued by the agency in *Gifford Pinchot*. *Id.* at 107.[24]

The Environmental Groups argue that the FWS conducted an improper economic analysis contrary to *Gifford Pinchot* because the FWS conducted a coextensive analysis that measured the impact of every conservation measure applicable to the fifteen vernal pool species and because the FWS regulation invalidated by the Ninth Circuit is still in effect. The FWS has not expressly withdrawn this invalidated

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[24] A similar conclusion was reached by the D.C. Circuit in a careful opinion that parses both *Gifford Pinchot* and *Cattle Growers* as well as the FWS regulation invalidated in *Gifford Pinchot*. The D.C. Circuit explained that,

> Under the Service's regulation, by virtue of the 'and's, both listing and designation result in consultations only when a species's survival is at stake, which makes it impossible for an action to bring about a consultation if only recovery is at stake. The definition of the adverse modification standard, then, fails to account for the ESA's command that critical habitat be designated for 'conservation,' and not merely survival.

Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, 344 F. Supp. 2d 108, 129 (D.D.C. 2004).

regulation, and the Ninth Circuit also explained in *Gifford Pinchot* that it "must [be] presume[d], unless rebutted by evidence in the record, that the FWS followed its [own regulation]."

It is in this legal framework that the court turns to the evidence in the record to see whether the FWS considered the recovery benefits that accompany critical habitat designation. In its final rule, the FWS explained as follows:

> While we have not yet proposed a new definition for public review and comment, compliance with the Court's direction [in *Gifford Pinchot*] may result in additional costs associated with the designation of critical habitat (depending upon the outcome of the rulemaking). In light of the uncertainty concerning the regulatory definition of adverse modification, our current methodological approach to conducting economic analyses of our critical habitat designations is to consider all conservation-related costs. This approach would include costs related to sections 4, 7, 9, and 10 of the [ESA], and should encompass costs that would be considered and evaluated in light of the *Gifford Pinchot* ruling.

Id. at 46,948. Thus, the FWS has indicated that it was not abiding by its invalidated regulation, but rather relying upon an economic analysis that included the costs of recovery, pursuant to *Gifford Pinchot*. The FWS also noted in its final rule that "each area designated as critical habitat may require some level of management and/or protection to address the current and future threats to each of the 15 vernal pool

species to ensure that they may *recover* . . . ." 70 Fed. Reg. at 46,945. To that end, the FWS specified several different measures that could be undertaken to ensure recovery, including preventing invasive species from crowding out native species, restoring the hydrology of vernal pool complexes, and managing off-road vehicle use. *Id.* The FWS further indicated that, for areas designated as critical habitat, "[p]rimary constituent elements in these areas would be protected from destruction or adverse modification by federal actions using a conservation standard based on the Ninth Circuit's decision in *Gifford Pinchot*. This requirement would be *in addition* to the requirement that proposed Federal actions avoid likely jeopardy to the species continued existence." *Id.* at 46,950. Additionally, the FWS explained that "[c]ritical habitat is being designated for all 11 [plant] species in other areas that will be accorded the protection from adverse modification by federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot*." *Id.*

However, these isolated instances discussing the recovery standard, and assurances by the FWS that *Gifford Pinchot* has been applied to the reasoning in the critical habitat designation, are contradicted by evidence in the record. Significantly, the penultimate version of the rule, issued on March 8, 2005, does not mention either recovery benefits or the ruling in *Gifford Pinchot* regarding the benefits or critical habitat. (Admin. R. Vol II: 15018098-102.) In early August, shortly before the final rule was released, the Environmental Groups point out that there were emails exchanged between staff members at the FWS, asking whether there was "Gifford-Pinchot language in [the final rule]?" (Admin. R. Vol. 2 (Docs. 186, 194,

204).) One staffer emailed that the final rule would not be approved by some members of the agency "unless we demonstrate that a *Gifford Pinchot* analysis was completed for this rule, per Mike *it does not have to be in the rule*, but must be in the Adm [sic] Record." (*Id.* (Doc. 194).)

In fact, it appears that new language regarding *Gifford Pinchot* was scattered throughout the August, 2005, rule as a result of the eleventh-hour email exchange amongst FWS staff members. (Admin R. Vol. 2 (Doc. 204) (The last email in this series in the record indicated that the following statements would be added to the final rule: "In light of the uncertainty concerning the regulatory definition of adverse modification, our current methodological approach to conducting economic analyses of our critical habitat designations is to consider all conservation-related costs. This approach would include costs related to sections 4, 7, 9, and 10 of the Act, and should encompass costs that would be considered and evaluated in light of (or in response to . . .) the *Gifford Pinchot* ruling.").) A careful examination of the Final Rule reveals that the FWS merely added language relating to the Ninth Circuit decision, instead of carefully considering and incorporating the Ninth Circuit's guidance in its critical habitat designation.

In the text of the rule, the FWS stated that "the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources . . . ." 70 Fed. Reg. at 46,924. The FWS also indicated its skepticism about the additional benefits provided by critical habitat designations. *Id.* The FWS cited an article that

concluded, "because the Act can protect species with and without critical habitat designation, critical habitat designation may be *redundant* to the other consultation requirements of section 7." *Id.* (emphasis added). Accordingly, there is insufficient evidence in the record to conclude that the FWS adequately considered the recovery benefits of a critical habitat designation in coming to the conclusions in its Final Rule.

The FWS's failure to consider the recovery goal of the designation is similar to the situation in *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1122 (N.D. Cal. 2006). In that case, Judge Illston concluded that, by finding "that there were no additional regulatory benefits to be gained by designating critical habitat in areas that were ultimately excluded, the Service improperly ignored the recovery goal of critical habitat." *Id.* Judge Illston also noted that "references to 'conservation' in the proposed and final rules cannot be squared with the reasoning in the final rule which essential, equates 'jeopardy' and 'adverse modification' determinations to conclude that the regulatory benefits of critical habitat in the excluded areas was negligible." *Id.* at 1146. This court is similarly unconvinced that the FWS actually considered the recovery benefits of critical habitat designation, notwithstanding the fact that it referenced *Gifford Pinchot*, and therefore concludes that the agency's critical habitat designation was arbitrary and capricious because it failed to comply with the applicable legal standards.

Finally, the Environmental Groups contend that the FWS's relative weighing of costs against benefits failed to consider the recovery and regulatory benefits

to the species upon critical habitat designation. The FWS did consider many potential benefits, including certain categories of benefits that reflect broader social values. (Admin. R. Vol. 2 at 17021468.) The FWS noted, however, that explicitly considering broader social values for the species and the habitat would duplicate the codification of the societal value of protecting species by Congress in enacting the ESA. (*Id.*) Additionally, the FWS did discuss at length the benefits that would be derived from the exclusion of the twenty-three census tracts at issue, including the fact that vernal pool species would have increased protection and landowners and the public would become educated about the conservation value of the vernal pool habitat. (*Id.* at 17021487-4 88.) The FWS also addressed the recovery benefits of designation by noting that it chose to exclude only twenty-three of the total 158 census tracts it considered designating as critical habitat to "recognize[] the benefits of including areas beyond the minimum necessary to avoid extinction, despite significant economic costs." (*Id.* at 17021468.) Because the agency has not made an "erroneous conclusion of law" and the court cannot say that the "record contains no evidence on which it could rationally base that decision," the court cannot find that the FWS abused its discretion with regard to its consideration of benefits. *Mendenhall v. Nat'l Transp. Safety Bd.*, 92 F.3d 871, 874 (9th Cir. 1996).

b. Non-Economic Exclusions

The Environmental Groups contend that the FWS improperly relied upon the existence of alternative land management plans in weighing the costs and benefits of exclusion pursuant to § 4(b)(2). In deciding what land to exclude from its critical habitat

designation, the FWS determined that for certain lands protected by existing management plans and practices, the benefits of inclusion are likely to be minimal and outweighed by the benefits of exclusion.

For the proposition that Federal Defendants may not exclude land based on the existence of alternative land management plans, the plaintiffs cite caselaw that applies to the definition of critical habitat provided in another section of the ESA. *See, e.g., Ctr. for Biologicai Diversity v. Norton*, 240 F. Supp. 2d 1090, 1100 (D. Ariz. 2003) (applying the definition of critical habitat in ESA § 3(5)(A)); *Nat. Res. Def. Council*, 113 F.3d at 1127 (same); *Conservation Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280, 1287 (D. Haw. 1998) (same).[25] By contrast, the relevant provision of the ESA here is § 4(b)(2), which permits the FWS to conduct a discretionary analysis of its exclusions. Thus, the Environmental Groups have not cited any authority that would preclude the FWS from considering the existence of other management schemes in deciding whether to exclude land from its critical habitat designation.

More specifically, the Environmental Groups argue that the Carrizo Plain National Monument was improperly excluded. The Bureau of Land Management had a 'draft management plan in place for the Carrizo Plain National Monument, which was set to become final in June, 2006. 70 Fed. Reg. at 46,947. This plan outlines "management for the long-term conservation and recovery of listed plants and animals and the natural communities on which they depend, and to

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[25] Pursuant to ESA 3(5)(A), "designation of critical habitat is necessary except when designation would not be 'prudent' or 'determinable.'" 16 U.S.C. § 1533(a)(3).

improve and sustain populations of federally listed species to meet conservation and recovery goals." *Id.* The species covered by the plan include the two species of fairy shrimp that would have been protected by the critical habitat designation. *Id.* The FWS did not merely defer to the Bureau of Land Management's authority; instead, it incorporated the nature of oversight by the Bureau of Land Management into its weighing of the benefits of inclusion versus exclusion and its determination of whether the species would become extinct absent inclusion. *Id.* at 46,948. The FWS was also responding to comments that critical habitat designation in the Carrizo Plain National Monument would "hinder essential voluntary conservation efforts." 70 Fed. Reg. at 46,929.

Additionally, the Environmental Groups contend that this court's previous order limited the scope of the exclusions the agency could make, and the agency improperly took action exceeding what the court ordered. However, the court merely required that the FWS complete a reevaluation of the land that was excluded at the time by March 8, and did not expressly preclude any other exclusions. *Butte Envtl. Council*, No. 04-140096, at 25. Thus, the FWS was not prevented from considering the exclusion of Carrizo Plain National Monument based on this court's previous holding.[26] Accordingly, the court finds the

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[26] The Environmental Groups further argue that the FWS did not provide adequate notice of its exclusion of the Carrizo Plain National Monument lands. "[T]he fact that a final rule varies from a proposal, even substantially, does not automatically void the regulations. Rather, [a court] must determine whether the inclusion of the BMPs in the final rule was in character with the original proposal and a logical outgrowth of the notice and

(continued...)

FWS's exclusion of the Carrizo Plain National Monument to be reasonable.

Similarly, the FWS reasonably determined that the benefits of exclusion outweighed the benefits of inclusion for areas within national wildlife refuges and within the Coleman National Fish Hatchery complex. 70 Fed. Reg. at 11,151. The FWS also concluded that exclusion would not result in extinction of the species. *Id.* The FWS noted that, "[a]ll of these refuges are developing comprehensive resource management plans that will provide for protection and management of all trust resources, including federally listed species and sensitive natural habitats." *Id.* Additionally, the agency explained that "[t]he comprehensive resource management plan for the Kern National Wildlife Refuge Complex has been completed and the associated biological opinion concluded that its implementation would not jeopardize the continued existence of these species." *Id.* (citation omitted). For these reasons, the FWS's decision to exclude the wildlife refuges from its critical habitat designation was not arbitrary or capricious.

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[28] (...continued)
comments received." *Rybachek v. United States Environ. Protection Agency*, 904 F.2d 1276, 1287-88 (9th Cir. 1990). Here, the FWS had indicated in its June, 2005 Federal Register notice that it was soliciting comments on whether any areas should be excluded and would reconsider all previously-submitted comments. 70 Fed. Reg. at 37,740-41. The Bureau of Land Management had requested the exclusion of Carrizo Plain National Monument lands. 70 Fed. Reg. at 11,145. Thus, exclusion of the National Monument lands was "a logical outgrowth of the notice and comments received," and therefore procedurally adequate.

The FWS additionally reasonably excluded areas having habitat conservation plans ("HCPs"). HCPs are developed as part of a permitting process for private lands when activities related to development will result in a taking of an endangered species. 16 U.S.C. § 1538(a)(1)(B) & (G); § 1539(a)(1)(B), (2)(A) & (B). A permit is only allowed if the taking is incidental, the impacts of the taking are minimized and mitigated, the applicant funds the plan adequately, the plan will not appreciably reduce the likelihood of species' survival and recovery, and other measures required by the agency are also met. 16 U.S.C. § 1539(a)(2)(B). In March 8, 2005, the FWS explained its exclusion of lands subject to HCPs based on its determination that the benefits of exclusion outweighed the benefits of inclusion, and the species would not become extinct as a result. 70 Fed. Reg. at 11,149-51.

The FWS also examined each individual plan to determine how it should be weighed, and expressly noted that the Western Riverside county MSHCP would "address[] the primary conservation needs of the species by protecting the ecosystem upon which it relies . . . [and] provide for the longer term conservation of this pool and vernal fairy shrimp." *Id.* at 11,150. In fact, the FWS explained that, "since the entire habitat area is addressed under the HCP, preserve, and mitigation bank and not just habitat with a federal nexus, the existing management already provides more protection than can be provided by a critical habitat designation." *Id.* Another part of the Western Riverside MSHCP, proposed unit 34 for the critical habitat designation, is the Santa Rosa Plateau Ecological Reserve, which is "owned by The Nature Conservancy (TNC), and is cooperatively managed by TNC, the Riverside County Regional Park and Open

Space District, CDFG [the California Department of Fish and Game], and the Service." *Id.* Federal Defendants point out that the designation of critical habitat is not only less powerful of a protection than an HCP, but also can adversely affect the partnerships with local jurisdictions and project proponents that are need to create HCPs by imposing duplicative regulatory burdens on the people involved. 70 Fed. Reg. at 11,149. Thus, as with the other non-economic exclusions, this exclusion was made in the FWS's reasonable exercise of discretion.

Finally, the FWS's exclusion of four areas of land belonging to the Department of Defense was proper. Those areas consisted of Travis Air Force Base ("AFB"), Beale AFB, Fort Hunter Ligget, and Camp Roberts. Pursuant to 16 U.S.C.A. § 1533, the FWS provided a determination in writing that these plans provide a benefit to some of the fifteen vernal pool species for Travis AFB and Beale AFB. *See* 70 Fed. Reg. at 11,153 ("Travis AFB has a Service-approved INRMP in place that provides a benefit for vernal pool fairy shrimp . . . ."); *id.* ("Beale AFB has a Service approved INRMP in place that provides a benefit for the vernal pool fairy shrimp and the vernal pool tadpole shrimp."). Additionally, both air force bases are now defunct.

Further, although the ESA provides that Department of Defense land may be excluded pursuant to 16 U.S.C.A. § 1533, Fort Hunter Liggett and Camp Roberts were excluded pursuant to ESA § 4(b)(2); in other words, they were excluded under the economic impact analysis previously discussed. *See, e.g.*, 70 Fed. Reg. at 11,145 ("The two Army National Guard Reserves Bases [Camp Roberts and Fort Hunter

Liggett] were excluded through § 4(b)(2) of the Act, since the benefits of excluding outweigh the benefits of including those vernal pool areas within the designation."); 68 Fed. Reg. at 46,750-52 (weighing the benefits of exclusion against the benefits of inclusion into the critical habitat designation for Camp Roberts and Fort Hunter Liggett); *id.* at 46,700 ("We recognize that designation of critical habitat has the potential to modify military training operations and the use or development of base facilities. We have determined that the benefits of excluding these facilities outweigh the benefits of including them. Subsequently, Camp Roberts and Fort Hunter Liggett have been excluded from this final designation of critical habitat.").

III. Conclusion

Home Builders' motion for summary judgment must be granted with respect to the exclusions of the two tracts with ongoing public projects involving the development of the UC Merced campus and the widening of Highway 99 in Tehama County. In all other respects, the motions of Home Builders, Tsakopoulos Investments, and the City of Suisun for summary judgment are denied.

The Environmental Groups' motion for summary judgment is granted on the limited ground that the FWS failed to consider the recovery standard under the ESA, pursuant to the Ninth Circuit's guidance in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1069 (9th Cir. 2004). In all other respects, the Environmental Groups' motion for summary judgment is denied, and the Federal Defendants' motion for summary judgment is granted.

The FWS's exclusions of critical habitat pursuant to § 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), in its Final Critical Habitat Rule of August 2005, Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Origin, and accompanying economic analysis, must be remanded to the FWS for further action and consideration consistent with all applicable laws and with the reasoning in this order.

IT IS THEREFORE ORDERED that this matter be, and the same hereby is, REMANDED to the FWS for further action and consideration consistent with this order. The FWS shall submit a new final critical habitat rule to the Federal Register for publication therein within 120 days of the date of this order.[27]

DATED: November 1, 2006

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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[27] The court previously allowed six months for the final designation of critical habitat, and because the necessary changes here are simply an amendment to a prior final designation, the court concludes that a 120 day deadline is more than reasonable for this purpose. *See Butte Environ. Council v. White*, 145 F. Supp. 2d 1180, 1185 (E.D. Cal. 2001) (allowing six months for the FWS to complete a final critical habitat designation and noting that many courts have allowed only 120 days for the same action).

Appendix D- 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, CALIFORNIA STATE GRANGE, and GREENHORN GRANGE,

Plaintiffs,

and

CITY OF SUISUN,

Plaintiff-Intervenor,

and

TSAKOPOULOS INVESTMENTS, TSAKOPOULOS FAMILY TRUST, DROSOULA TSAKOPOULOS, and GEORGE TSAKOPOULOS,

Plaintiff-Intervenors,

v.

FILED
Jan. 24, 2007

NO. CIV. S-05-0629 WBS-GGH

MEMORANDUM AND ORDER

UNITED STATES FISH AND WILDLIFE SERVICE; H. DALE HALL, Director of the United States Fish and Wildlife Service; UNITED STATES DEPARTMENT OF INTERIOR; and GALE A. NORTON, Secretary of the United States Department of Interior,

Defendants,

and

DEFENDERS OF WILDLIFE, BUTTE ENVIRONMENTAL COUNCIL, AND CALIFORNIA NATIVE PLANT SOCIETY,

Defendant-Intervenors.

BUTTE ENVIRONMENTAL COUNCIL, DEFENDERS OF WILDLIFE, CALIFORNIA NATIVE PLANT SOCIETY, SAN JOAQUIN RAPTOR AND WILDLIFE RESCUE CENTER, SIERRA FOOTHILLS AUDUBON SOCIETY, and VERNALPOOLS.ORG,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, and U.S. FISH AND WILDLIFE SERVICE,

Defendants.

Plaintiffs brought this action pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* Plaintiffs challenge the United States Fish and Wildlife Service's ("FWS") critical habitat designation of over 800,000 acres of land in California and Oregon for fifteen vernal pool species. Currently pending before the court are two motions for reconsideration, clarification, or amendment of this court's November 2, 2006, order, filed by plaintiff, Home Builders Association of Northern California, et al. ("Home

Builders") and plaintiffs and defendant-intervenors, Butte Environmental Council, et al. ("Environmental Groups"). Also pending before the court is a motion to intervene as a defendant, filed by the Regents of the University of California ("Regents").

I. Factual and Procedural History[1]

Pursuant to the Endangered Species Act, the FWS listed as endangered fifteen species of plants and animals that live in vernal pool environments. *See* 43 Fed. Reg. 44,810 (Sept. 28, 1978); 57 Fed. Reg. 24,192 (June 8, 1992); 59 Fed. Reg. 48,136 (Sept. 19, 1994); 62 Fed. Reg. 14,338 (Mar. 26, 1997); 62 Fed. Reg. 33,029 (June 18, 1997); 16 U.S.C. 1533. The fifteen species are four crustaceans and eleven plants, distributed in vernal pool complexes located throughout southern Oregon, parts of California, and parts of northern Mexico. 70 Fed. Reg. 46,925 (Aug. 11, 2005).

In September, 1994, when the FWS listed the four species of fairy shrimp as endangered, it determined that critical habitat designation for the fairy shrimp was nonetheless "not prudent" because "such designation likely would increase the degree of threat from vandalism or other human activities." 59 Fed. Reg. at 48,151. In February, 2001, this court joined other courts' findings in determining that the FWS' deviation from its statutory mandate to designate critical habitat, concurrently with the listing of a species as endangered, violated the APA. *Butte Envtl.*

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[1] The significant factual and procedural history of this case are described in greater detail in this court's prior order, which parties now seek the court to reconsider. (Nov. 2, 2006 Order.) For the purposes of this motion, the following relevant facts are sufficient.

Council v. White, 145 F. Supp. 2d 1180, 1185 (E.D. Cal. 2001).

Accordingly, pursuant to an order by this court, the FWS published a proposed rule to designate 1,662,762 acres of critical habitat for the fifteen vernal pool species on September 24, 2002. 67 Fed. Reg. 59,884. The FWS subsequently issued an "initial" final critical habitat designation on August 6, 2003, that diminished the amount of critical habitat by more than one million acres. 68 Fed. Reg. 46,684; *see Butte Envtl. Council*, No. 04-0096 at 4. In January, 2004, Environmental Groups challenged these exclusions from the critical habitat designation in this court. *Butte Envtl. Council*, No. 04-0096, at 4. The court remanded for reconsideration, but did not set aside the critical habitat designation in the interim.

On March 8, 2005, the FWS confirmed its non-economic exclusion determinations in the August 6, 2003, final rule. 70 Fed. Reg. 11,140 (Mar. 8, 2005). Subsequently, on August 11, 2005, the FWS published its final rule designating-approximately 858,846 acres of critical habitat in 34 California counties and one county in southern Oregon. 70 Fed. Reg. 46,924 (Aug. 11, 2005). This final rule excluded the 20 census tracts that would suffer the greatest economic impact, along with three for which the economic benefits of exclusion outweighed the benefits of inclusion. *Id.* at 46,931-32, 46,948-52.

On March 30, 2005, Home Builders filed a complaint under the ESA, NEPA, and APA, challenging FWS's critical habitat designation, (Compl.) and on November 2, 2006, this court ruled on five cross-motions for summary judgment. (Nov. 2, 2006 Order.) The court found that the FWS's

reasoning regarding its exclusions from critical habitat designation failed to adequately consider the recovery standard under the ESA, pursuant to *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1069 (9th Cir. 2004). (*Id.* at 70.) The court additionally held that the exclusion of two particular tracts from the critical habitat designation (Highway 99 in Tehama County and land being developed for the University of California at Merced) was arbitrary and capricious, because the FWS failed to adequately explain its reasoning. (*Id.*) Accordingly, the court remanded the matter back to the FWS, with instructions to submit a new final rule within 120 days, consistent with the order. (*Id.* at 70-71.)

On November 16, 2006, the Environmental Groups filed a motion to amend the judgment pursuant to Rule 59(e), and on November 17, 2006, Home Builders filed a similar motion. In addition, on December 11, 2006, the Regents filed a motion to intervene, claiming that this court's remand of the exclusion of the tract at Merced has violated a significant protectable interest.

II. Discussion

A. Motion for Reconsideration

A district court may reconsider an order under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend judgment) or Rule 60(b) (relief from judgment or order). *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985). Both the Environmental Groups and Home Builders frame their motions as being brought under Rule 59, however both motions were filed more than ten days after entry of the summary judgment order for which they seek

reconsideration.[2] The court therefore construes both motions as being brought pursuant to Rule 60(b). Fed. R. Civ. P. 60(b) ("[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding . . . ."); *see Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1463 n.35 (9th Cir. 1992) (a motion for reconsideration brought later than ten days after entry of judgment is construed as a motion brought under Rule 60(b)).

Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). A motion for reconsideration "should not merely present arguments previously raised, or which could have been raised in the initial summary judgment motion." *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1130 (E.D. Cal. 2001) (citing *Backlund*, 778 F.2d at 1388).

Rule 60(b) "provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *Sch. Dist. No. 1J*, 5 F.3d at 1263; Fed. R. Civ. P. 60(b). Under Rule 60(b), reconsideration is generally only appropriate where the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening

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[2] Rule 59(e) states that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Rule 54 defines "judgment" as "a decree and any order from which an appeal lies."

change in controlling law. *See Westlands Water Dist.*, 134 F. Supp. 2d at 1131.[3]

1. Environmental Groups' Motion

The Environmental Groups argue that this court's conclusion that the FWS failed to adequately consider the recovery standard in specifying its exclusions cannot be squared with the relief granted, asserting that the non-economic exclusions must also be remanded for reconsideration by the FWS. (Envtl. Groups Mot. for Recons. 3-7.) The Environmental Groups also seek clarification of two aspects of this court's previous order, requesting this court: 1) to instruct the FWS that it may not engage in "coextensive" economic impact analysis of exclusions to the critical habitat designation on remand; and 2) to vacate all exclusions. (*Id.* at 7-9.)

This court's November 2, 2006, order found fault with the FWS's exclusions to its critical habitat designation, as analyzed under Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), based on its failure to adequately analyze the recovery benefits conferred by a critical habitat designation.[4] (Nov. 2, 2006 Order 63.) ("This court is . . . unconvinced that the FWS actually

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[3] The court notes that analysis under Rule 59(e) would result in the same outcome. Under Rule 59(e), reconsideration is appropriate only if the "district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah County v. AC&S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (limiting the use of reconsideration to "highly unusual" circumstances).

[4] "Recovery benefits" refers to the requirement that the promulgated Rule adequately address not only the mere *survival* of the endangered species, but also its *recovery*.

considered the recovery benefits of critical habitat designation.") With regard to the ultimate relief granted, the court therefore remanded the exclusions to the FWS for reconsideration consistent with the order. (*Id.* at 70.) ("The FWS's exclusions of critical habitat pursuant to § 4(b)(2) . . . and accompanying economic analysis, must be remanded to the FWS . . . .")

The Environmental Groups, however, point to language in this court's prior order which they assert is incongruous with the court's ultimate conclusion regarding consideration of the recovery standard. (Envtl. Groups Mot. for Recons. 5.) ("[T]he Court cannot hold that FWS failed to consider the recovery benefits while simultaneously concluding that its balancing of benefits used to justify its exclusions is reasonable.") (citing Nov. 22, 2006 Order 64 ("[T]he court cannot find that the FWS abused its discretion with regard to its consideration of benefits.")) The Environmental Groups are of course correct—the paragraph beginning on page 63 of this court's November 22, 2006, order was included in error and is inconsistent with the preceding ten pages of discussion. Accordingly, the court will amend its prior order, withdrawing this contradictory paragraph. As reasoned on pages 53 through 63 of this court's prior order, the FWS's economic analysis did *not* adequately consider the recovery benefits of critical habitat designation in designating its exclusions.

a. Non-Economic Exclusions

The question still remains regarding what significance that holding has for the non-economic exclusions. The Environmental Groups contend that, because the FWS's economic analysis failed to

adequately consider the recovery standard when balancing the benefits of exclusion with the benefits of designation as critical habitat, the-non-economic exclusions were also invalid as a matter of law. The court reviews the FWS's decision to exclude areas pursuant to Section 4(b)(2) "for abuse of discretion." *Bennett v. Spear*, 520 U.S. 154, 172, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997).

As explained in great detail, this court's previous order held that the FWS's engaged in improper economic analysis with regard to the exclusions from critical habitat because it neglected to consider the recovery of the species. As the Ninth Circuit made clear in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1063 (9th Cir. 2004), the definitions of "jeopardize" and "destruction or adverse modification" were sufficiently similar, so that a Section 7 consultation would be triggered, under either definition, only when a species' *survival* is threatened. Accordingly, *Gifford* invalidated the regulation's definition of "adverse modification," as inconsistent with the ESA's recovery goal.

This court's inquiry in its November 22, 2006, order focused on a section of the Service's final rule wherein it indicated that "[t]his section allows the Secretary to exclude areas from critical habitat for economic reasons if she determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat." 70 Fed. Reg. 46,948. In an effort to demonstrate compliance with *Gifford*, this section of the Rule professed an allegiance to the Ninth Circuit's guidance. 70 Fed. Reg. 46,948 ("[O]ur current methodological approach to conducting economic

analyses of our critical habitat designations is to consider all conservation-related costs.").

This court found, however, that despite the FWS's assertions that they considered recovery in their economic analysis, the few references to the recovery standard in this section of the rule merely constituted last minute additions of language, in a hollow attempt to satisfy *Gifford*. (Nov. 2, 2006 Order 60-63.) The economic analysis used to designate these twenty three exclusions was improper, and accordingly these exclusions were remanded back to the FWS.

The various non-economic exclusions, however, did *not* employ the same such balancing of economic benefits and costs—indeed, by definition, these exclusions were based on *non-economic* factors.[5] Of course, regardless of the type of analysis used to exclude areas from the critical habitat designation, the FWS continues to have an obligation to consider the recovery goals of the ESA. To this end, this court conducted a separate inquiry into the FWS's analysis of the non-economic exclusions. (Nov. 2, 2006 Order 64-70.) After lengthy analysis, this court found that FWS had reasonably concluded that the non-economic exclusions were governed by alternative land management plans which already adequately incorporated the ESA's recovery goals. (*Id.* at 65 (affirming exclusion of Carrizzo Plain National Monument); *id.* at 67 (affirming exclusion of national wildlife refuges and the Coleman National Fish Hatchery complex); *id.* at 67-68 (affirming exclusion of

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[5] 16 U.S.C. 1533(b)(2) does not specify exactly how an agency is to analyze exclusions, merely that it determine whether the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat."

lands with Habitat Conservation Plans ("HCPs")); *id.* at 69 (affirming exclusion of two areas of land belonging to the Department of Defense).[6] Thus, while the twenty three economic exclusions were remanded for consideration of the recovery goals, this court found that the non-economic exclusions sufficiently followed *Gifford*'s reasoning and were not an abuse of discretion requiring remand.

b. Coextensive Economic Analysis

The Environmental Groups also seek clarification from this court, requiring express instruction that the FWS may not consider coextensive costs in its analysis on remand. In order to understand the impact of this court's previous order with regard to coextensive analysis, it is necessary to briefly recount the court's reasoning parsing two relevant cases, *New Mexico Cattle Growers v. U.S. Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), and *Gifford Pinchot*, 378 F.3d 1059.

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[6] The rule indicates that FWS's analysis considered recovery for: 1) Carrizzo Plain National Monument by noting that "Goals and Implementation Guidelines of the CPRMP include management for the long-term conservation and recovery of listed plants and animals," 70 Fed. Reg. 46,947; 2) national wildlife refuges and the Coleman National Fish Hatchery complex by noting that exclusion will not appreciably increase the likelihood of activities that would "diminish the value of the habitat for conservation of the species," 70 Fed. Reg. 11,151; 3) lands governed by HCP's, by noting that "[t]he purpose of such an HCP is to describe and ensure . . . that the action does not appreciably reduce the survival and recovery of the species," 70 Fed. Reg. 11,151; and 4) Department of Defense lands by noting that they were excluded pursuant to 16 U.S.C. 1533(a)(3)(B), prohibiting designation of critical habitat for lands subject to integrated natural resource management plans (INRMPs), 70 Fed. Reg. 11,153-54.

The *Cattle Growers* case rejected a "baseline" approach to analyzing the economic impact of critical habitat designation, in favor of a "coextensive" approach. *Cattle Growers*, 248 F.3d 1285. A baseline approach uses a "but for" method of determining what economic impacts flow from a critical habitat designation. By contrast, a coextensive approach to analyzing economic impact allows an agency, in considering the impact of a *critical habitat designation* (whose purpose is ensuring the survival and recovery of the species), to also consider the economic impact of *listing* the species as endangered (whose sole purpose is ensuring the survival of the species).

Admittedly, some courts have criticized the reasoning of *Cattle Growers*, because the coextensive analysis permits an agency to consider the economic impact of listing a species in contravention of the ESA's intent.[7] *Cape Hatteras Access Pres. Alliance v. U.S. DOI*, 344 F. Supp. 2d 108, 130 (D.D.C. 2004) ("The Service, however, must not allow the costs below the baseline to influence its decision to designate or not designate areas as critical habitat. That would be inconsistent with the ESA's prohibition on considering economic impacts during the species listing process."); *see also Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1152 (N.D. Cal. 2004). However, in *Cattle Growers*, the court was given the choice between possibly ruling contrary to the ESA's intent (via coextensive analysis), or explicitly violating the ESA's provision that a critical habitat designation

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[7] The ESA mandates that an endangered species listing determination be based "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). Economic analysis is not a factor in the analysis.

be made upon consideration of the "economic impact." As discussed *supra*, this was because the definition of "adverse modification" effectively conflated the survival and recovery goals of the species, thereby subsuming and rendering null any beneficial impact of critical habitat designation, analyzed in comparison to the impact benefits conferred by listing a species. *See Cattle Growers*, 248 F.3d at 1284-85.

However, courts and agencies are no longer "hamstrung by [their] inability to consider the validity of 50 C.F.R. § 402.02," *Cape Hatteras*, 344 F. Supp. 2d at 129-30, because the court in *Gifford* explicitly invalidated that provision. 378 F.3d at 1071. Thus, an agency is no longer prevented from engaging in a meaningful analysis of the economic impact of a critical habitat designation, above and beyond the impact of listing a species. While this does undercut the reasoning that the *Cattle Growers* court used to invalidate the baseline approach, it does *not* require the conclusion that a coextensive analysis is legally improper.

The ESA mandates that the FWS consider various impacts (economic and other) "of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). It does not, however, mandate that in its analysis of those impacts, the FWS be precluded from also considering the impact of listing the species as endangered. Indeed, the statute's language appears to anticipate a broad inquiry regarding any potential impacts of the critical habitat designation. 16 U.S.C. 1533(b)(2) (mandating consideration of "and any other relevant impact"). In this respect, *Cattle Growers* and *Gifford Pinchot* are not mutually exclusive—as long as

the recovery goals of the ESA are given appropriate consideration.[8]

In its final rule, the FWS indicated that in "conducting economic analyses, we are guided by the 10th Circuit Court of Appeal's [sic] ruling in *New Mexico Cattle Growers v. U.S. Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), which directed us to consider all impacts, 'regardless of whether those impacts are attributable co-extensively to other causes.'" 70 Fed. Reg. 46,948. As explained in the November 22, 2006, order, the FWS additionally retained the CRA International consulting firm, who projected the economic impacts of the critical habitat designation *above and beyond* the baseline regulatory burden. (Nov. 2, 2006 Order 47 (citing Admin R., Vol. 2, Doc. 358 45-46.) CRA International also analyzed the administrative costs associated with Section 7 consultations for listing a species, as well as the designation of a critical habitat. (*Id.* (citing Admin R., Vol. 2, Doc. 358 10.))

To the extent that the FWS's coextensive inquiry may have insufficiently considered the recovery standard, by focusing *solely* on those costs which are coextensive with listing, this court's remand of the

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[8] It is of course possible that an agency conducting a coextensive analysis pursuant to *Cattle Growers* might also be continuing to follow the invalidated regulatory definition of adverse modification in 50 C.F.R. § 402.02, and thus would fail to adequately consider the recovery standard as required by *Gifford Pinchot*. It is for this reason that the court's previous order noted that "[t]o the extent that the FWS relied on *Cattle Growers* and neglected to consider the effects of the critical habitat designation on species' recovery, pursuant to *Gifford Pinchot*, the critical habitat designation is not consistent with applicable Ninth Circuit precedent. (Nov. 2, 2006 Order 57 n.22.)

twenty three exclusions addresses that deficiency. However, it is not the *coextensive analysis* which is faulty, but the lack of sufficient consideration of the ESA's recovery standard. Accordingly, this court declines to instruct the FWS on remand that it may not conduct a coextensive analysis.[9]

c. Vacatur of Exclusions

Finally, the Environmental Groups seek vacatur of all of the exclusions remanded back to the FWS. Indeed, the general rule is for a court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While the court did find that the FWS's exclusions were improper, and thus deserving of remand, this does mandate vacatur.

Indeed, "when equity demands, the regulation can be left in place while the agency follows the necessary procedures." *Idaho Farm Bureau Fed. v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (citing *W. Oil and Gas v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980)). Factors to be considered in deciding whether to vacate or not include: (1) the purposes of the substantive statute under which the agency was acting, (2) the

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[9] The court also notes the questionable nature of the Environmental Groups' request. *See INS v. Ventura*, 537 U.S. 12, 16, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002) ("Generally speaking, a court . . . should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20, 73 S. Ct. 85, 97 L. Ed. 15 (1952) ("[T]he guiding principle ... is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.").

consequences of invalidating the agency action, and (3) and potential prejudice to those who will be affected by maintaining the status quo. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982).

Significant is the fact that, while the FWS has committed error requiring remand, that error is minor in the grand scheme of its analysis. For this reason, the court found the need to only grant the FWS 120 days in which to correct its analysis. Moreover, given the slight nature of the agency's error, there is a legitimate possibility that the agency will be able to substantiate its rule without altering the ultimate substance. *Fox Television Stations, Inc. v. F.C.C.*, 350 U.S. App. D.C. 79, 280 F.3d 1027, 1048 (D.C. Cir. 2002) (citing *Allied-Signal, Inc. v. United States Nuclear Regulatory Comm'n*, 300 U.S. App. D.C. 198, 988 F.2d 146, 150-51(D.C. Cir. 1993) ("The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.").

Finally, the court notes its interest in intervening as little as possible into an already incredibly complex environmental regulation. *W. Oil*, 633 F.2d at 813 ("We are also influenced by the possibility of undesirable consequences which we cannot now predict that might result from invalidation of the designations. Our intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible. Under the unusual circumstances of this case and guided by authorities that recognize that a reviewing

court has discretion to shape an equitable remedy, we leave the challenged designations in effect.") In this court's prior order, it reasoned that the balance of equity counsels in favor of leaving the rule in place, and the Environmental Groups have not presented any reasoning as to why this finding must be disturbed. Accordingly, the exclusions to the FWS's critical habitat designation will not be vacated.

2. Home Builders' Motion

Home Builders seeks reconsideration of this court's prior order in two respects. First, Home Builders asserts that this court's decision to invalidate two of the twenty three economic exclusions as arbitrary and capricious effectively granted relief that no party sought. (Home Builders' Mot. for Recons. 1-2.) Secondly, Home Builders argues that this court's order did not adequately dispose of their argument that the FWS's improperly employed a standard of qualifying an area as a critical habitat designation as long as it contained one primary constituent element. (*Id.* 2-3.)

a. Exclusion of UC Merced and Tehama County Tracts

Home Builders contends that their motion for summary judgment did not seek invalidation of any of the existing economic exclusions, and thus this court's relief remanding two existing economic exclusions (Highway 99 in Tehama County and the development of the University of California at Merced) was improper. To the extent that Home Builders argues that this court granted relief sought by no party, this contention is incorrect. Specifically, the Environmental Groups' motion for summary judgment sought exactly

such relief. (Environmental Groups Mot. for Summ. J. 25-28.) ("The elimination of these twenty three census tracts should be set aside . . . .") The fact that the Environmental Groups chose to object to the exclusions *en masse* does not mean that this court is limited to only finding fault with all, or none, of the exclusions. Both Home Builders and the Environmental Groups called into question the validity of the FWS's exclusion analysis, and the court found fault with only a particular portion of such analysis. Accordingly, the relief granted was not improper.

However, notwithstanding this fact, the court now takes the opportunity on this motion to reevaluate its reasoning with regard to the two tracts, and upon reconsideration, finds that it was in error. As noted in the November 2, 2006, order, an agency "is obligated to 'articulate[] a rational connection between the facts found and the choices made.'" *Pac. Coast Fed'n of Fishermen's Assocs. v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005) (quoting *NRDC v. United States DOI*, 113 F.3d 1121, 1126 (9th Cir. 1997)). At that point, it appeared to the court that, while the FWS had indicated high costs for the Merced and Tehama tracts, it had made no "relative comparison amongst all tracts." (Nov. 2, 2006 Order 51.) The FWS had given "no indication that these two tracts are among the twenty-two most impacted tracts," and at oral argument the Federal Defenders were unable to articulate why this might be the case. (*Id.*)

Upon reconsideration of the record, in particular the June 30, 2005, Proposed Rule, 70 Fed. Reg. 37,739, and August 11, 2005, Final Rule, 70 Fed. Reg. 46,924, it now appears that the FWS *did* sufficiently explain

why the two tracts in question were included. In the Proposed Rule, the FWS indicated that it was considering excluding the twenty highest cost areas, as calculated in their draft economic analysis, and sought comments explaining why any of these twenty should not be excluded, or additional tracts should be excluded. 70 Fed. Reg. 37,740. As affirmed by this court's previous order, the FWS rationally concluded that because "approximately 80 percent of the total costs are represented by 25 percent of the critical habitat" in these twenty tracts, exclusion was reasonable. (Nov. 2, 2006 Order 49-50; 70 Fed. Reg. 37,740.)

However, as a result of the public notice and comment period, the FWS learned of "additional costs" previously not factored into its economic analysis, in the amount of "$10,000,000 for UC Merced and $6,093,965 for Highway 99." 70 Fed. Reg. 46,950. After adjusting their draft economic analysis to account for this new information, the new estimated economic costs of designating as critical habitat UC Merced and Highway 99 in Tehama became $15,759,870 and $11,453,799, respectively. 70 Fed. Reg. 46,949 (Table 2). It is now clear that economic costs of this magnitude *do* in fact place these two tracts well within the "twenty-two most impacted tracts," and squarely within the reasoning previously approved of. Accordingly, the court will amend its prior order.[10]

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[10] The court wishes to make clear that, while these two particular tracts are no longer singled out and remanded based on arbitrary economic analysis, (Nov. 2, 2006 Order 51), it remains true, as discussed above, that *all twenty-three* tracts, including these two, are remanded to the FWS for reconsideration consistent with this court's order and the recovery standard in *Gifford*.

b. Standard for Designating Critical Habitat

Home Builders' second request for clarification asserts that this court failed to address their principal argument that the Service violated the ESA by evaluating whether areas could be designated as critical habitat based on whether they contain "one or more of the species [Primary Constituent Elements ("PCEs")]." (Home Builders' Mot. for Recons. 2.) Home Builders presently argues, as they previously did in their motion for summary judgment, that every area designated as critical habitat must contain *all* PCEs. (*Id.*)

Home Builders' contention that this court neglected to address their argument is without merit. On page 35 of the November 2, 2006, order, the court made clear in a lengthy footnote that the particular nature of vernal pools, and their need to be "fed by upland areas," means that a particular area "may not be occupied by the species, and may not contain a vernal pool . . . . Regardless of whether they contain a vernal pool, or other PCEs, they are still essential to the conservation of the 15 vernal pool species." (Nov. 2, 2006 Order 35 n.7.)

A motion for reconsideration "should not merely present arguments previously raised." *Westlands Water*, 134 F. Supp. 2d at 1130 (citing *Backlund*, 778 F.2d at 1388). It is a "extraordinary remedy," reserved for situations where the court has erred, or new relevant information has come to light. *Kona*, 229 F.3d at 890. It is not a forum for a party to attempt to reargue matters already decided by the court. Home Builders has already briefed and argued this point, and the court has already ruled. Other than simply

rehashing previous arguments, Home Builders has not demonstrated why reconsideration is proper. Accordingly, the court declines to revisit the issue.

B. Regents' Motion to Intervene

The Regents are the true owners of the land being developed as part of the University of California at Merced, which was originally excluded from the critical habitat designation in the FWS's August 11, 2005, final rule. The Regents have invested significant time and money into the development of UC Merced Project, and the designation of their land as critical habitat would no doubt interfere with their development plans. (Regents' Mot. to Intervene 1.) However, as indicated in their motion, while they have closely monitored the litigation, until now they have decided not to intervene because the issues raised by the parties demonstrated that their interests were adequately represented. (*Id.*)

Subsequent to this court's November 2, 2006, order, the Regents sought to intervene based wholly on this court's singling out of the UC Merced tract.[11] They seek to intervene in order to protect their interests in the UC Merced Project, because they contend it is substantially and individually affected by this court's previous order. However, as explained in Section II(A)(2)(a), *supra*, this court will now be amending its prior order, withdrawing any reference to the reasoning the Regents found objectionable. Therefore, the Regents' justification for intervening is now moot.

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[11] "[The lack of a desire to intervene] changed, however, with the Court's SJ Order, which for the first time singled out the UC Merced Project, analyzed it separately from the remaining twenty-one Census tracts whose exclusion the court affirmed, and concluded that the Service's analysis for excluding just the UC Merced Project was insufficient." (Regents' Mot. to Intervene 1.)

Indeed, a cursory analysis of the standards for intervention as a matter of right and permissive intervention supports this conclusion. Rule 24 allows intervention as a matter of right under various circumstances "unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a). Because the tract at UC Merced is no longer singled out for individual treatment, as the Regents themselves confess, their interests are sufficiently represented by the parties already involved in the case. (Regents' Mot. to Intervene 1.)

Permissive intervention is allowed when an applicant's "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). In this case, the Regents' unique claims have become moot—the reasoning in this courts previous order to which they are objecting will be withdrawn pursuant to this order. (Regents' Mot. to Intervene 17) ("Regents' claims and defenses . . . are in direct response to determinations made by the Court['s November 2, 2006 order] in this action.") Accordingly, the court will decline to grant the Regents' motion.[12]

C. Timing on Remand

In this court's previous order, it reasoned that because the necessary changes were "simply an amendment to a prior final designation . . . a 120 day deadline is more than reasonable for this purpose." (Nov. 2, 2006 Order 71 n.27) (citing *Butte Environ. Council v. White*, 145 F. Supp. 2d 1180, 1185 (E.D. Cal.

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[12] As this court indicated to the Regents at oral argument, however, if it becomes necessary for the Regents to intervene at a later date (for example, to represent unique interests upon appeal) it may do so at that time.

2001) (allowing six months for the FWS to complete a final critical habitat designation and noting that many courts have allowed only 120 days for the same action)). While this court is granting, in part, both motions for reconsideration of the previous order, the substantive changes are not great, and thus the issues on remand are similarly minor. However, in light of the uncertainty created by both motions, the court will grant the FWS 120 days from the issuance of this order within which to complete the new critical habitat rule.

III. Conclusion

IT IS THEREFORE ORDERED that Environmental Groups' motion for clarification, reconsideration, or amendment be, and the same hereby is, GRANTED IN PART. The entire paragraph beginning on page 63 of this court's November 2, 2006, order, is hereby WITHDRAWN.

IT IS FURTHER ORDERED that Home Builders' motion for clarification, reconsideration, or amendment be, and the same hereby is, GRANTED IN PART. The two paragraphs on pages 50 and 51, as well the first paragraph on page 70, of this court's November 2, 2006, order, regarding the remand specifically of the exclusions of UC Merced and Tehama County, are hereby. WITHDRAWN.

IT IS FURTHER ORDERED THAT:

(1) in all other respects, Environmental Groups' and Home Builders' motions for reconsideration be, and the same hereby are, DENIED;

(2) the Regents' motion to intervene be, and the same hereby is, DENIED;

(3) this matter be, and the same hereby is, REMANDED to the FWS for further action and consideration consistent with this order, as well as the portions of this court's November 2, 2006 order not withdrawn above. The FWS shall submit a new final critical habitat rule to the Federal Register for publication therein within 120 days of the date of this order.

DATED: January 23, 2007

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

16 U.S.C. § 1533. Determination of endangered species and threatened species

(a) Generally,

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, scientific, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * *

(3) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable—

(A)(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * * *

16 U.S.C. § 1536. Interagency cooperation

(a) Federal agency actions and consultations.

* * * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * *

Appendix G–1

Economic Impacts of Critical Habitat Designation for Vernal Pool Species

Prepared For:
Division of Economics
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4401 North Fairfax Drive
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Prepared By:
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June 20, 2005
CRA No. D07040

* * * *

IV.1.3 Defining the Baseline

OMB Guidelines for conducting economic analysis of environmental regulation direct Federal agencies to measure the costs of a regulatory action against a

baseline.[78] In its guidance, OMB states, the "baseline should be the best assessment of the way the world would look absent the proposed action." In other words, the baseline includes the currently existing regulatory and socioeconomic burden imposed on landowners and managers potentially affected by the designation of critical habitat. The baseline burden may include, for example:

- Local zoning laws;
- State natural resource laws;
- Enforceable management plans and best management practices applied by other State and Federal agencies; and/or
- Federal, State, and local protections already in place in the same geographic area for other (Federal and State) listed species.[79]

This analysis describes impacts that are expected to occur above and beyond the baseline. That is, it measures the costs of compliance with the Act that would not occur in the absence of the currently proposed critical habitat. In 2001, the U.S. 10th Circuit Court of Appeals instructed the Service to conduct a full analysis of all of the economic impacts of

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[78] U.S. Office of Management and "Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations; Notice," 68 Federal Register 5492, February 3, 2003; and U.S. Office of Management and Budget, "Appendix 4: Guidelines to Standardize Measure of Costs and Benefits and the Format of Accounting Statements," in Report to Congress on the Costs and Benefits of Federal Regulations, March 22, 2000.

[79] Certain regulations that provide baseline protection for the species and its habitat may also be the source of indirect costs resulting from new information provided by the designation.

proposed CHD, regardless of whether those impacts are attributable to the listing decision (New Mexico Cattle Growers Assn v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001)). Thus, the economic analysis considers the economic impact of all ESA-related conservation of vernal pools undertaken in areas of critical habitat.

* * * *

179

(3)

No. 10-605

Supreme Court, U.S.
FILED

In The
Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA, *et al.*,

Petitioners,

v.

UNITED STATES FISH AND
WILDLIFE SERVICE, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION OF RESPONDENTS DEFENDERS OF WILDLIFE, BUTTE ENVIRONMENTAL COUNCIL, AND CALIFORNIA NATIVE PLANT SOCIETY

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January 5, 2011

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Endangered Species Act ("ESA") requires that species be listed based solely on the "best scientific evidence" available. The U.S. Fish and Wildlife Service ("FWS") may not consider economics in determining whether a species is threatened or endangered. In contrast, Congress commanded FWS to take into account the potential economic impact of a rule designating critical habitat for such species.

In the present case, FWS used the "baseline" approach to analyze the economic impact of critical habitat for endangered vernal pool species. Under the "baseline" approach, FWS considers the incremental costs of designating critical habitat over and above the costs attributable to listing the species.

1. Did the court of appeals err when, consistent with the intent of the ESA, it upheld the U.S. Fish and Wildlife Service's use of the "baseline" approach to analyze the economic impact of a rule designating "critical habitat," an approach which precludes consideration of the economic impact of listing and other prior conservation actions because these costs would exist regardless of the critical habitat designation?

RULE 29.6 STATEMENT

Respondents Defenders of Wildlife, Butte Environmental Council, and California Native Plant Society are each non-profit, non-stock corporations. They have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

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INTRODUCTION

Congress commanded the U.S. Fish and Wildlife Service ("FWS") when designating critical habitat under the Endangered Species Act ("ESA") to take into account the potential economic impact of that designation. Congress did not dictate the form of economic analysis nor did it direct FWS to exclude areas from critical habitat on the basis of that analysis. Indeed, Congress made clear that in most instances critical habitat should be designated as part of the panoply of protections afforded to endangered and threatened species under the ESA.

Petitioners Home Builders Association of Northern California, *et al.* ("Home Builders") urge this Court to disapprove FWS's method for reviewing the economic impact of critical habitat designations. To bolster their petition, Home Builders allege a conflict between the Ninth and Tenth Circuits over whether FWS may use the "baseline" approach to economic analysis, which calculates the cost of listing and other conservation measures that will occur regardless of critical habitat and then determines the additional impact of critical habitat designation.

First, Home Builders mischaracterize the nature of any disagreement between the Ninth and Tenth Circuits. Although the Tenth Circuit did reject the baseline approach in a 2001 opinion, its reasoning was based on a 1986 FWS regulation that two circuits have found unlawful. A reasonable reading of that opinion, and its reliance on this now-defunct

regulation, suggests the Tenth Circuit might well reach a different conclusion if presented with the issue today. In other words, there is no true circuit split at this time that warrants resolution by this Court.

Second, FWS's use of the baseline approach is correct. Several courts have now approved the baseline approach as a reasonable method of assessing the actual costs of a particular critical habitat designation because logically the world with the designation should be compared to the world without it. The baseline approach is the method most consistent with the text and purpose of the ESA.

Third, even if Home Builders were to prevail, the result in this case is unlikely to change. FWS has thoroughly considered the economic impact of this designation through a decade of litigation and remands. Regardless of the analytical method employed or the degree of economic impact, the ESA does not compel FWS to exclude areas from critical habitat.

Fourth, Home Builders failed to challenge FWS's methodology below and in a Rule 28(j) letter to the Ninth Circuit expressly denied they were challenging FWS's use of the baseline approach. Home Builders' presentation of the question to this Court is thus fundamentally flawed, making this case a poor vehicle for reviewing this issue.

The case involves no genuine conflict of authority and was correctly decided. Throughout the proceedings, Home Builders failed to demonstrate how FWS

committed any error in designating critical habitat. The Ninth Circuit's well-reasoned opinion was issued without dissent. Accordingly, this Court should deny the petition.

STATEMENT OF THE CASE

Home Builders' statement of the case does not provide an adequate history of the litigation. Since 1978, FWS has listed eleven vernal pool-dependent plants and four crustaceans as threatened or endangered. Pet. App. A-4-5. In 1994, when FWS issued a final rule designating four vernal pool crustaceans as endangered or threatened, it declined to designate critical habitat at that time. 59 Fed. Reg. 48,136, 48,151 (Sept. 19, 1994). The Building Industry Association of Superior California ("BIA") challenged the listing and failure to designate critical habitat in the U.S. District Court for the District of Columbia. The court upheld the listing but ordered FWS to designate critical habitat. BIA then struck the critical habitat claim from its complaint in order immediately to appeal the denial of the listing claims. *Bldg. Indus. Ass'n of Superior Cal. v. Norton,* 247 F.3d 1241, 1244 (D.C. Cir. 2001). Meanwhile, in 2001, a federal district court in California also held that FWS violated the ESA and the Administrative Procedure Act by failing to designate critical habitat for these species. *Butte Envtl. Council v. White,* 145 F. Supp. 2d 1180, 1185 (E.D. Cal. 2001).

In response to these suits, FWS proposed designating 1,662,762 acres of critical habitat for these fifteen species in California and Oregon in 2002. 67 Fed. Reg. 59,884 (Sept. 24, 2002). After public comment, FWS excluded five California counties on economic grounds and eliminated other areas on non-economic grounds, reducing the total designation in the final rule by more than one million acres, to roughly 600,000 acres. 68 Fed. Reg. 46,684 (Aug. 6, 2003). Further litigation by environmental and building industry groups, coupled with concerns by the Interior Department's Office of the Inspector General that political appointees improperly influenced decision-making on this issue, led FWS to seek a voluntary remand, which the U.S. District Court for the Eastern District of California granted in October 2004. Pet. App. A-7.

FWS then held an additional public comment period and commissioned a new economic analysis by CRA International, Inc. to determine the likely economic impacts of the designation. 70 Fed. Reg. 37,739, 37,741 (June 30, 2005). CRA International, Inc., *Economic Impacts of Critical Habitat Designation for the Vernal Pool Species* 45-46 (June 20, 2005), *available at* http://www.fws.gov/economics/Critical%20Habitat/Final%20Draft%20Reports/vernal%20pool%20species%20redo/VPS-6-20-05.pdf (visited Jan. 4, 2011). In August 2005, FWS adopted new economic exclusions, 70 Fed. Reg. 46,924, 46,948-52 (Aug. 11, 2005), and in February 2006, issued a final rule designating

858,846 acres of land as critical habitat. 71 Fed. Reg. 7118 (Feb. 10, 2006).

Both sides commenced new litigation over the final rule. Home Builders and a group of intervenors claimed the rule went too far, while Butte Environmental Council *et al.* (Respondents herein) found it lacking. The district court granted FWS summary judgment on Home Builders' claims but ruled for Butte Environmental granting a new remand on whether the designation adequately provided for species recovery, in addition to species survival, as required by *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069-70 (9th Cir. 2004). *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. Civ. S-05-0629, 2006 U.S. Dist. LEXIS 80255 (E.D. Cal. Nov. 2, 2006) (Pet. App. C). Motions for reconsideration resulted in still another ruling, although the result did not change. *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. Civ. S-05-0629, 2007 U.S. Dist. LEXIS 5208 (E.D. Cal. Jan. 24, 2007) (Pet. App. D). After that remand, FWS reissued the rule with no substantive alterations, 72 Fed. Reg. 30,279 (May 31, 2007), whereupon the district court entered judgment for FWS and Home Builders commenced their appeal.

REASONS FOR DENYING THE WRIT

I. No Clear Circuit Split Exists Regarding The Baseline Approach

Home Builders argue that the Ninth Circuit's decision in this case conflicts with a 2001 decision of the Tenth Circuit that overturned a critical habitat designation in which FWS had employed the baseline method of economic analysis. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001). Home Builders overstate the existence of any conflict. The Tenth Circuit's decision has been superseded by events and may no longer be good law even in that circuit. Consideration of the Question Presented on the basis of this alleged conflict is not warranted.

Since *New Mexico Cattle Growers* was decided, courts outside of the Tenth Circuit have found its rationale no longer persuasive because it was based on a 1986 FWS regulation, 50 C.F.R. § 402.02, that two other circuit courts have struck down as inconsistent with the ESA. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001). Now that FWS no longer follows the regulation, these courts unanimously concluded that the baseline approach is in fact the appropriate method for taking into account the economic impact of critical habitat designation. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), *petition for cert. filed* (U.S. Oct. 1, 2010)

(No. 10-454); *Fisher v. Salazar*, 656 F. Supp. 2d 1357 (N.D. Fla. 2009); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004). As these cases have held, analysis of the impacts of critical habitat logically should include only those costs that would occur as a result of its designation, and not those that would exist even if FWS did not designate any habitat.

FWS previously took the policy position that designation of critical habitat was superfluous and provided no additional protection or benefit to the species. Reflecting this view, FWS adopted a regulation in 1986 that defined the statutory terms "jeopardy" to a species and "adverse modification" of critical habitat. In the words of the Tenth Circuit, the standards FWS set were "virtually identical, or, if not identical, one (adverse modification) is subsumed by the other (jeopardy)." 248 F.3d at 1283. Because FWS viewed adverse modification as functionally equivalent to jeopardy, the agency inevitably found that, using a baseline approach, the designation "was not expected to result in any incremental restrictions on agency activities." *Id.* at 1284.

FWS's 1986 regulation was central to the Tenth Circuit's decision. Indeed, the Tenth Circuit's opinion noted that regulation was the "root of the problem," 378 F.3d at 1283, because it essentially nullified the ESA's command that FWS separately consider the economic analysis. In the court's words: "The regulation's

definition of the jeopardy standard as fully encompassing the adverse modification standard renders any purported economic analysis done utilizing the baseline approach virtually meaningless." *Id.* at 1285. Although the Tenth Circuit noted that the regulation was likely unlawful,[1] the court was "compelled by the canons of statutory interpretation to give some effect to the congressional directive that economic impacts be considered at the time of critical habitat designation." *Id.* at 1285. "Because economic analysis done using the FWS's baseline model is rendered essentially without meaning *by 50 C.F.R. § 402.02*," the court concluded that the baseline approach was inconsistent with statutory intent. *Id.* (emphasis added).

That is no longer the case. After the Fifth Circuit first struck down the 1986 regulation in *Sierra Club*, the Ninth Circuit in *Gifford Pinchot* also found that it conflicted with the text and purpose of the ESA. The *Gifford Pinchot* court held that FWS had misinterpreted the ESA's definition of "destruction or adverse modification" of critical habitat, and had thus overlooked the importance of critical habitat to the recovery – not merely the survival – of listed species. 378 F.3d at 1069-70. "The ESA was enacted not

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[1] Citing the Fifth Circuit's holding in *Sierra Club*, the Tenth Circuit panel noted: "Though these regulatory definitions are not before us today, federal courts have begun to recognize that the results they produce are inconsistent with the intent and language of the ESA." 248 F.3d at 1283 n.2.

merely to forestall the extinction of species (*i.e.*, promote a species survival), but to allow a species to recover to the point where it may be delisted." *Id.* at 1070 (citing 16 U.S.C. § 1532(3)). By not considering the value of protecting unoccupied lands that were important to the future recovery of the species, FWS had impermissibly undercut the purpose and value of designating critical habitat. *Id.*

After *Gifford Pinchot*, FWS officially changed its policy and began recognizing that critical habitat provided increased protection for species. U.S. Fish & Wildlife Serv., *Application of the "Destruction or Adverse Modification" Standard under Section 7(a)(2) of the Endangered Species Act* (Dec. 9, 2004), *available at* http://www.fws.gov/midwest/endangered/permits/hcp/pdf/AdverseModGuidance.pdf (visited Jan. 4, 2011). FWS no longer defines adverse modification of critical habitat as the "functional equivalent" of species jeopardy; rather, FWS recognizes that habitat protection may impose additional costs and benefits over and above listing. Now when FWS takes economics into account using the baseline method, the intent of Congress that the additional impacts of designation (but not listing) be taken into account can be fulfilled.

Because *New Mexico Cattle Growers* is inextricably based on an invalid regulation that does not accurately account for how FWS currently assesses the costs and benefits of critical habitat, its holding does not reflect the current state of the law. A true circuit split does not exist.

II. The Baseline Approach Is Proper For Analyzing The Economic Impact Of Critical Habitat

FWS properly "[took] into consideration" the economic impacts "of specifying any particular area as critical habitat." 16 U.S.C. § 1532(b)(2). FWS hired CRA International, Inc. to prepare a thorough economic analysis, and determine the economic baseline for the affected areas. CRA followed Office of Management and Budget guidance that the "baseline should be the best assessment of the way the world would look absent the proposed action." 68 Fed. Reg. 5492, 5517 (Feb. 3, 2003); Pet. App. A-7-8. The analysis compared the state of affairs prior to designation of critical habitat – i.e., the baseline – with "how things would look after designation of critical habitat." Pet. App. A-7-8, A-18. As part of this analysis, the consultant included consideration of compliance with other state and local zoning and natural resource laws. Pet. App. A-19. The analysis "estimates the total cost of species conservation activities without subtracting the impact of pre-existing baseline regulations (i.e., the cost estimates are fully coextensive)." Pet. App. C-49. CRA also analyzed the "administrative costs associated with Section 7 consultations for listing a species, as well as the designation of critical habitat." Pet. App. D-15.

As noted above, various courts have held that this analytical approach complies with the ESA. In *Cape Hatteras*, the court held that "[t]he baseline approach is a reasonable method for assessing the

actual costs of a particular critical habitat designation" because logically "the world with the designation must be compared to the world without it." 344 F. Supp. 2d at 130. Under the holding of *Cape Hatteras,* Home Builders' preferred approach would conflict with the ESA, because FWS "must not allow the costs below the baseline to influence its decision to designate or not designate areas as critical habitat," as "[t]hat would be inconsistent with the ESA's prohibition on considering economic impacts during the species listing process." *Id.*; *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d at 1152 (agreeing that "the baseline approach was both consistent with the language and purpose of the ESA and that it was a reasonable method for assessing the actual costs of a particular critical habitat designation.").

The court in *Fisher v. Salazar* further explained that once FWS abandoned its "functional equivalence theory" after *Gifford Pinchot*, the baseline approach became "a reasonable method, consistent with the language and purpose of the ESA for assessing the actual costs of a particular habitat designation." 656 F. Supp. 2d at 1371. The *Fisher* court noted that the Fifth Circuit had also rejected FWS's "functional equivalence theory" in a case challenging FWS's failure to designate critical habitat for the Gulf sturgeon, and thus, if presented with the issue, would logically approve the baseline approach. *See id.* at 1369 (citing *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001)).

Since *Gifford Pinchot* and *Sierra Club*, the baseline approach has been FWS's preferred method of economic analysis. Approved by numerous courts, it is the approach that best fulfills the requirements of the ESA.

III. The Secretary Of The Interior's Decision To Perform An Exclusion Analysis Is Discretionary, Thus The Result In This Case Is Unlikely To Change Under Any Analytical Method

Home Builders' petition is predicated on the notion that FWS would designate fewer acres of land if the agency were to accept their measure of economic impact. This is not likely.

An Interior Solicitor's Opinion recently concluded that "language of the statute appears to give the Secretary broad discretion in determining whether to exclude areas." Department of the Interior, Solicitor's Opinion M-37016, at 6, *available at* http://www.doi.gov/solicitor/opinions/M-37016.pdf (visited Jan. 4, 2011). Indeed, FWS "is not required to perform an exclusion analysis" at all, "no matter how severe the impacts of a designation might be." *Id.* at 17. After considering economic and other impacts of designation, FWS may, *but need not*, elect to exclude an area from designation based on its consideration and weighing of these factors. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19.

Here, FWS has already conducted a thorough economic analysis and is well aware of the potential

costs and benefits of critical habitat and other conservation measures. Home Builders would clearly prefer that FWS give more weight to their assertions of economic injury in hopes that the agency might designate fewer acres of critical habitat. But FWS is neither required to adopt Home Builders' analytical scheme nor, if FWS did so, would it be obligated under the ESA to designate fewer acres of critical habitat for the vernal pool species.

Ultimately, the petition for a writ of certiorari in this case is a statement of policy preference; it fails to demonstrate any error in the appellate court ruling and does not compel a conclusion that FWS's designation of critical habitat for the vernal pool species is worthy of further review.

IV. Home Builders Did Not Properly Raise The Question Presented On Appeal

The argument Home Builders now make in support of certiorari was never squarely presented to the Ninth Circuit, and was in fact specifically disclaimed in filings with that court. While the Ninth Circuit was considering this case, that court decided another challenge to designation of critical habitat. *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), *petition for cert. filed* (U.S. Oct. 1, 2010) (No. 10-454). Counsel for the federal Respondents informed the panel of the decision via a Rule 28(j) letter and asserted its relevance to the issues in this case. In response, Home Builders argued that

Arizona Cattle Growers – which upheld the FWS's use of the baseline approach to economic analysis – was not relevant to this case. Home Builders' letter states: "Th[e government's] contention is incorrect. In this appeal, the Home Builders contend, among other things, that the Federal Defendants' failure to assess the *cumulative* impact of the critical habitat designation is illegal." Letter from M. Reed Hopper to Molly Dwyer, Clerk, Ninth Circuit (June 10, 2010) (Appendix A).

Indeed, what Home Builders actually alleged in their briefs was not that FWS erred in using the baseline approach or that the Ninth Circuit should adopt the Tenth Circuit's reasoning in *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001). In fact, Home Builders did not even cite *New Mexico Cattle Growers* in their opening or reply briefs. Rather, Home Builders alleged that FWS violated the National Environmental Policy Act ("NEPA") by failing to conduct an adequate "cumulative effects" analysis pursuant to 42 U.S.C. § 4321. A NEPA violation is, of course, a completely different legal issue, which the Ninth Circuit properly rejected, and which Home Builders do not allege in their present petition.

Although the Ninth Circuit, in rejecting Home Builders' NEPA claim, briefly discussed the analogous guidance of *New Mexico Cattle Growers* and the controlling *Arizona Cattle Growers*, the issue of whether FWS should have adopted a "baseline" or "co-extensive" approach to economic analysis was not

squarely before the court and never briefed by Home Builders. Such a defect should be fatal to Home Builders' petition for writ of certiorari. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 459-60 (8th ed. 2002).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 5, 2010

[LOGO] **PACIFIC LEGAL FOUNDATION**

June 9, 2010

Ms. Molly Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Home Builders Association of Northern California v. U.S. Fish & Wildlife Service*, No. 07-16732

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j), Appellants Home Builders Association of Northern California, *et al.*, provide this response to the citation letter of supplemental authorities submitted by the Federal Defendants. In that letter, the Federal Defendants contend that this Court's decision in *Arizona Cattle Growers' Association v. Salazar* (*AGCA*), No. 08-15810, 2009 U.S. App. LEXIS 29107 (9th Cir. June 4, 2010), upholding the use of a "baseline" approach to the economic impact analysis mandated by Section 4(b)(2) of the Endangered Species Act, 16 U.S.C. § 1533(b)(2), is relevant to the same issue raised in the Home Builders' appeal. That contention is incorrect. In this appeal, the Home Builders contend, among other things, that the Federal Defendants' failure to assess the *cumulative* impact of the critical habitat designation is illegal. *See* Opening Br. at 34-36. The contention is distinct from the *AGCA* issue of whether the economic impact of the designation, in isolation, can or should be determined using a

baseline as opposed to a "coextensive" approach. *See* Reply Br. at 19 n.6.

AGCA does, however, speak to an issue relevant to the Home Builders' appeal. The Federal Defendants contend that, to designate occupied critical habitat, they need only identify those physical or biological features essential to a species's survival and not its recovery. Further, the Federal Defendants contend that they need not know when a species will be deemed "conserved" before designating critical habitat. The Home Builders contend that this approach contravenes the Court's holding in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). *See* Opening Br. at 24-25; Reply Br. at 3-5. The Court's discussion of *Gifford Pinchot* in *AGCA* is consistent with the Home Builders' argument. *See AGCA*, 2009 U.S. App. LEXIS 29107, at *15.

Respectfully submitted,

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[Certificate Of Service Omitted In Printing]

No. 10-605

In the Supreme Court of the United States

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In designating "critical habitat" for an endangered species or a threatened species under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, the Secretary of the Interior must "tak[e] into consideration" (among other things) "the economic impact * * * of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The question presented is whether that provision requires the Secretary to consider economic conditions that would exist irrespective of his actions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 616 F.3d 983. The opinions of the district court on cross-motions for summary judgment (Pet. App. C1-C73) and on subsequent motions for reconsideration (D1-D25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2010. The petition for a writ of certiorari was filed on October 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, provides "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. 1531(b). The Act carries out its purposes, in part, by directing the Secretary of the Interior (Secretary), who administers the Act through the United States Fish and Wildlife Service, to designate certain species, and their habitats, for federal protection.

The Act instructs the Secretary to "determine," according to certain specified factors, "whether any species is an endangered species or a threatened species." 16 U.S.C. 1533(a)(1). An "endangered species" is "any species" (except for certain insect pests) "which is in danger of extinction throughout all or a significant portion of its range"; a "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(6) and (20). The Secretary is required to publish a list of all endangered species and threatened species in the *Federal Register*. 16 U.S.C. 1533(c)(1). Endangered species and threatened species receive certain statutory protections. See, *e.g.*, 16 U.S.C. 1536(a)(2), 1538(a).

The Act further instructs that, in conjunction with designating an endangered species or threatened species, the Secretary should, subject to certain qualifiers and exceptions, "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. 1533(a)(3)(A)(i). A species' "critical habitat" includes "the specific areas within the geographical area

occupied by the species, at the time" it is designated an endangered species or a threatened species, "on which are found those physical or biological features * * * essential to the conservation of the species and * * * which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). The "critical habitat" also includes "specific areas outside the geographical area occupied by the species at the time" it is designated an endangered species or a threatened species, "upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii). Designation as critical habitat gives an area special protected status against encroachment. See 16 U.S.C. 1536(a)(2).

The Secretary's decision to classify a species as an endangered species or a threatened species must be made "solely on the basis of the best scientific and commercial data available to him." 16 U.S.C. 1533(b)(1)(A). The Secretary's decision to designate critical habitat, must be made "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless exclusion will result in the extinction of the species. *Ibid.*

2. This case concerns "vernal pools," a "unique kind of wetland ecosystem" that consists of "shallow depressions that hold water seasonally" and dry up at other times. *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for Four*

Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 68 Fed. Reg. 46,685 (2003). Between 1978 and 1997, the Secretary designated four crustacean species and 11 plant species that live in vernal pools as endangered species or threatened species. Pet. App. A5. The vernal pools that support those species "have a discontinuous distribution west of the Sierra Nevada that extends from southern Oregon through California into northern Baja California, Mexico." 68 Fed. Reg. at 64,685.

On August 6, 2003, after extensive public comment, the Secretary published a final designation of critical habitat for certain vernal-pool-related lands. 68 Fed. Reg. at 46,684. The designation excluded certain areas from classification as critical habitat based on a determination, pursuant to 16 U.S.C. 1533(b)(2), that the economic impact of inclusion outweighed the benefits. 68 Fed. Reg. at 46,745-46,746.

After environmental groups challenged some of those exclusions in court, the Secretary solicited further public comment and published a new final critical-habitat designation on August 11, 2005. Pet. App. C8-C10; see *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon; Evaluation of Economic Exclusions From August 2003 Final Designation*, 70 Fed. Reg. 46,924. Like the original rule, the new rule excluded certain areas (although not precisely the same areas) from the critical-habitat designation based on economic considerations. 70 Fed. Reg. at 46,948-46,952. In total, the final critical-habitat designation includes 858,846 acres in 34 counties in California and one county in southern Oregon. Pet. App. C9.

The Secretary's analysis of the potential economic impact of the critical-habitat designation was consistent with guidance from the Office of Management and Budget. Pet. App. A18; see *Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations*, 68 Fed. Reg. 5492 (2003). The analysis, prepared by an outside consultant, "compare[d] the current state of affairs—the baseline—with how things would look after designation of critical habitat." Pet. App. A18. That is to say, the analysis "projected the economic effects that would occur in the census tracts affected by the designation, *above and beyond* the baseline of the existing regulatory and economic burden landowners and managers currently bear." *Id.* at C49. The Secretary "expressly indicated in [the] analysis that [he] took into account both the economic impact of listing the species" as endangered species or threatened species "and the economic impact of the critical habitat designation." *Id.* at C50 n.17.

3. Following the Secretary's promulgation of the updated rule, the government faced litigation "from both sides" in the Eastern District of California: petitioners, a group of trade organizations, "challenged the final critical habitat designation for going too far," while an environmental group "challenged it for not going far enough." Pet. App. A8. The district court ultimately granted summary judgment for the Secretary on petitioners' claims, but remanded the rule to the agency for reconsideration (which ultimately resulted in no substantive change) based on one of the environmental group's claims. *Id.* at A8-A9.

One of petitioners' arguments in the district court was that the Secretary's economic-impact analysis was deficient because it considered only the impact of the

critical-habitat designation itself, and not the impact of listing the various vernal-pool species as endangered species or threatened species. Pet. App. C48-C50. The district court rejected that argument, concluding that the analysis had, in fact, taken the impact of both regulatory actions into account. *Id.* at C48-C50 & n.17.

On appeal, petitioners focused on a somewhat different economic-impact argument, one that the district court had not directly addressed. See Pet. 6. Petitioners argued "for a 'cumulative' assessment" of economic impact "that would include," in addition to the cost of the Secretary's critical-habitat designation itself, "the costs of complying with other regulations" as well. Pet. App. A18-A19. The court of appeals rejected petitioners' argument. *Id.* at A17-A20. The court observed that "the plain language of [the] ESA" –which requires the agency to consider the "economic impact * * * of specifying any particular area as critical habitat" (16 U.S.C. 1533(b)(2))—"directs the agency to consider only those impacts caused by the critical habitat designation itself." Pet. App. A19. The court declined to analogize the impact analysis required by the ESA to the impact analysis required for different purposes under a different environmental statue, the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* Pet. App. A19. And the court stated that petitioners' position was "contrary to" its decision in *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160 (9th Cir.), petition for cert. pending, No. 10-454 (filed Oct. 1, 2010), which had "rejected the notion" that the Secretary is "'required to attribute to the critical habitat designation economic burdens that would exist even in the absence of that designation.'" Pet. App. A20 (quoting 606 F.3d at 1172).

ARGUMENT

Petitioners renew (Pet. 7 21) their contention that 16 U.S.C. 1533(b)(2) requires the Secretary to "assess[] the incremental impact of [a critical-habitat] designation *in combination with* the economic regulatory baseline." Pet. 11. According to petitioners, it is not enough for the Secretary to determine that the economic burden on affected communities will be, say, $10 million greater with the designation than without it, and to weigh that $10 million cost against the environmental benefits of the designation. Instead, in petitioners' view, the Secretary must compare the environmental benefits of the designation to the total cost of complying with all other regulatory measures in addition to the ESA — and, apparently must consider *all* economic conditions in the affected communities, even if those conditions exist independently of, have nothing to do with, and would be unaffected by, the Secretary's actions. Pet. 11 & n.9. Petitioners would thus have the Secretary in this case consider such factors as "state[] and local land-use laws," "the national economic malaise," the "lingering effects of [California's] just recently resolved budget crisis," and the downturn in California's housing market. Pet. 11 n.9, 15-17 & n.13.

Petitioners' contention lacks merit and was properly rejected by the court of appeals. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. To begin with, petitioners' position is refuted by the plain language of the Act. Section 1533(b)(2) states in relevant part that the Secretary shall designate critical habitat "after taking into consideration the economic impact * * * *of specifying any particular area as crit-*

ical habitat." 16 U.S.C. 1533(b)(2) (emphasis added). The statute accordingly directs the Secretary's attention to the economic impact created by the designation of critical habitat under the ESA. It neither requires nor authorizes the Secretary to consider economic conditions that are unrelated to his actions. See Pet. App. A19.

Considering unrelated economic impacts to be part of the economic impact of the critical-habitat designation is inconsistent with the "cost/benefit" analysis that the statute contemplates for critical-habitat designations. See 16 U.S.C. 1533(b)(2) (critical-habitat designations must take into account the "economic impact * * * of specifying any particular area as critical habitat," and the Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"). Because the Secretary cannot avoid unrelated economic impact by declining to designate critical habitat, it makes little sense to consider it to be an impact of his critical-habitat decision.

To the extent that there is any ambiguity in the statute, the Secretary's interpretation is entitled to deference. Petitioners do not dispute the Secretary's authority to interpret the Act, and the notice-and-comment procedures followed in making the critical-habitat designation confirm that deference is warranted. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001).

2. Petitioners identify no authority that supports their argument. Their reliance (Pet. 7-11) on the Tenth Circuit's decision in *New Mexico Cattle Growers Ass'n* v. *United States Fish & Wildlife Service*, 248 F.3d 1277 (2001), is misplaced. That decision—which petitioners did not cite in either their opening brief or their reply

brief in the court of appeals—did not address the argument that petitioners are making here. It instead addressed the separate question of whether an analysis of the "economic impact" of a critical-habitat designation must include an analysis any economic impact of the related agency action of "listing" the relevant species as an endangered species or a threatened species. *Id.* at 1281-1285.

In particular, the Tenth Circuit in *New Mexico Cattle Growers* addressed the permissibility of the following practice:

> In order to determine what the "economic impact" of a [critical-habitat designation] will be, the [Secretary] has adopted an incremental baseline approach (the "baseline approach"). The baseline approach utilized by the [Secretary] is premised on the idea that the listing of the species (which will occur prior to or simultaneously with the [critical-habitat designation]) will have economic impacts that are not to be considered. The primary statutory rationale for this position comes from 16 U.S.C. § 1533(b)(1)(A), which states that listing determinations be made "solely on the basis of the best scientific and commercial data available." Thus, the baseline approach moves any economic impact that can be attributed to listing below the baseline and, when making the [critical-habitat designation], takes into account only those economic impacts rising above the baseline.

248 F.3d at 1280. The Tenth Circuit concluded that this "baseline approach to economic analysis is not in accord with the language or intent of the ESA." *Id.* at 1285.

Contrary to petitioners' suggestion (Pet. 8-9), *New Mexico Cattle Growers* did not present, much less de-

cide, the question of whether, in designating critical habitat, the Secretary must consider economic conditions that have no connection at all to his own actions. Rather, the Tenth Circuit in that case simply adopted "the approach advocated by the appellants": that the Secretary must "take into account all of the economic impact of the [critical-habitat designation], regardless of whether those impacts are caused co-extensively by *any other agency action* (such as listing) and even if those impacts would remain in the absence of the [critical-habitat determination]." 248 F.3d at 1283 (emphasis added). As the district court in this case observed, the Secretary's decision here expressly complied with *New Mexico Cattle Growers* by considering the economic impact both of listing the 15 vernal-pool species as endangered species and threatened species and of designating certain vernal-pool-related areas as critical habitat. Pet. App. C49-C50; see 70 Fed. Reg. at 46,928.

3. Petitioners contend (Pet. 8-11) that certiorari is warranted because of a purported conflict between *New Mexico Cattle Growers* and the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160 (9th Cir.), petition for cert. pending, No. 10-454 (filed Oct. 1, 2010). The government's separate brief in opposition in *Arizona Cattle Growers' Ass'n* addresses the assertion that those two cases are in conflict. But even assuming that they are, the fact remains that there is no conflict between *New Mexico Cattle Growers* and *this* case. The mere fact that the decision below cites *Arizona Cattle Growers' Ass'n* (see Pet. App. A18, A20) for certain propositions does not make the decision inconsistent with *New Mexico Cattle Growers*. Indeed, petitioners themselves filed a letter with the court of appeals insisting that the argument they are making

here was "distinct from" the ultimate issue decided in *Arizona Cattle Growers' Ass'n*. 07-16732 Docket entry No. 30, at 1 (9th Cir. June 9, 2010).

4. Petitioners' remaining arguments (Pet. 12-20) similarly fail to present any reason for further review. Those arguments focus primarily on the policy impact of environmental decisions like the one at issue here. But petitioners' policy disagreements with environmental regulation in general, or with the Secretary's discretionary decision to designate critical habitat here, are not proper subjects for this Court's review. See 16 U.S.C. 1533(b)(2) (permitting Secretary to decide whether benefit of designation outweighs economic impact).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-605

In the
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HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA; et al.,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners Home Builders Association of Northern California, *et al.*, seek review of the Ninth Circuit Court of Appeals' decision authorizing grossly inadequate economic impact analyses under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544. The arguments of Respondents United States Fish and Wildlife Service, *et al.*, and Respondents Defenders of Wildlife, *et al.*, against a grant of certiorari are without merit.

First, the Ninth Circuit's decision *does* squarely conflict with the Tenth Circuit's decision in *New Mexico Cattle Growers Association v. United States Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). The Ninth Circuit below, in following *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (petition for certiorari pending, No. 10-454), recognized as much. *See* Pet. App. A-20. Moreover, the Tenth Circuit's holding—that the Service must take into account more impacts than just those directly caused by critical habitat designation—is irreconcilable with the Ninth Circuit's holding below that no impacts other than those directly caused by designation need be assessed. And nothing in subsequent case law or regulatory practice undercuts *New Mexico Cattle Growers* within the Tenth Circuit.

Second, the Service and Defendant-Intervenors entirely ignore the significant nationwide impact of the Ninth Circuit's decision and the rule it enunciates. Whatever role that impact may have in the Court's legal analysis of the underlying issues, it is undeniably relevant to determining whether the writ should be granted. *See* Sup. Ct. R. 10(a) (certiorari may be warranted where decisions of federal courts of appeals

conflict on an "important matter"); Eugene Gressman, *et al.*, Supreme Court Practice 269 (9th ed. 2007).

Third, Petitioners' cumulative economic impacts issue is properly presented to this Court. Petitioners briefed and argued it below, and the panel's decision directly addressed it.

Finally, the Service's and Defendant-Intervenors' many arguments as to why the Ninth Circuit got it right, *see* Serv. Opp'n at 7-9; Def.-Int. Opp'n at 1-12, are irrelevant to whether review is merited in this Court. Those arguments do, however, highlight the exceptional importance of the issue presented—whether the Service can ignore the significant economic consequences of its regulations in contravention of the ESA's command that the Service "take into consideration" such consequences prior to designating critical habitat. *See* 16 U.S.C. § 1533(b)(2).

ARGUMENT

I

THE NINTH CIRCUIT'S DECISION BELOW CONFLICTS WITH THE TENTH CIRCUIT'S DECISION IN *NEW MEXICO CATTLE GROWERS*

A. The Service's Various Rationales for Reconciling *New Mexico Cattle Growers* with Ninth Circuit Case Law Are Unconvincing

The Service argues that there is no conflict between the decision below and the Tenth Circuit's ruling in *New Mexico Cattle Growers*. Serv. Opp'n at 10. That contention is without merit. The Ninth Circuit below, in rejecting Petitioners' arguments

about cumulative economic impacts, equated those arguments with an attack on the "baseline" approach. The Ninth Circuit in *Arizona Cattle Growers* expressly approved the "baseline" approach whereas the Tenth Circuit in *New Mexico Cattle Growers* expressly disapproved it. *See* Pet. App. A-20. Indeed, the panel below quoted *Arizona Cattle Growers* specifically to establish that the Ninth Circuit had already "rejected the notion that '[the Service] was required to attribute to the critical habitat designation economic burdens that would exist even in the absence of that designation.'" *Id.* (quoting *Ariz. Cattle Growers Ass'n*, 606 F.3d at 1172). That *Arizona Cattle Growers* (and by extension the panel below) rejected *New Mexico Cattle Growers* is beyond dispute. *See Ariz. Cattle Growers Ass'n*, 606 F.3d at 1173 ("We therefore reject the Tenth Circuit's approach in *New Mexico Cattle Growers Association* as relying on a faulty premise and hold that the [Service] may employ the baseline approach in analyzing the critical habitat designation.").

Contrary to the view of the Service, *see* Serv. Opp'n at 10-11, and the Defendant-Intervenors, *see* Def.-Int. Opp'n at 13-14, it is irrelevant whether Petitioners or the Service or anybody else believes that *Arizona Cattle Growers* or the decision below is reconcilable with *New Mexico Cattle Growers*; what matters is that the *Ninth Circuit* recognized and held that the rule it adopted is in conflict with the rule adopted by the Tenth Circuit, and that the Tenth Circuit's rule is not acceptable in the Ninth Circuit.

In a related vein, the Service contends that *New Mexico Cattle Growers* actually undercuts Petitioners' cumulative impacts argument. *See* Serv. Opp'n at 8-

10. The Service reads *New Mexico Cattle Growers* as rejecting the baseline approach but as not addressing whether "economic conditions that have no connection at all to [the Service's] own actions" should be considered. Serv. Opp'n at 10. It is true that *New Mexico Cattle Growers* did not decide just how many impacts should be assessed other than those for which critical habitat designation is a but-for cause. But it *did* hold that at least some impacts for which critical habitat is *not* a but-for cause *should* be considered. *See New Mexico Cattle Growers*, 248 F.3d at 1285 ("[W]e conclude Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes."). Petitioners' arguments build upon and are consistent with *New Mexico Cattle Growers*.[1] The Ninth Circuit panel below evidently agreed in holding that those arguments were foreclosed because *Arizona Cattle Growers* had already rejected the rule of *New Mexico Cattle Growers*. *See* Pet. App. A-20.

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[1] Contrary to the Service's assertions, Serv. Opp'n at 10, it is irrelevant that the district court below held that the Service had complied with *New Mexico Cattle Growers*. The analysis that *New Mexico Cattle Growers* prescribes is necessary – but not sufficient – to discharge the ESA's economic impact assessment obligation. Moreover, Defendant-Intervenors' contention that review in this Court is unnecessary because even should Petitioners prevail, the outcome would likely change little, *see* Def.-Int. Opp'n at 12-13, misses the mark. Whether the Service has discretion on remand in how to respond to a properly executed economic analysis in no way relieves the Service of doing the job right. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.").

The Service's contention that *New Mexico Cattle Growers* did not address whether impacts unrelated to the ESA (as opposed to impacts unrelated to critical habitat designation only) may be assessed is untenable. Several courts have rejected *New Mexico Cattle Growers* because of their disagreement with the Tenth Circuit's resolution of the *precise* issue which, the Service asserts, the Tenth Circuit did not reach—namely, whether the Service may consider *any* impacts (be they attributable to the ESA or not) for which critical habitat designation is not a but-for cause.

For example, *Arizona Cattle Growers* rejected *New Mexico Cattle Growers* and the baseline approach on the grounds that "[t]he very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made," *i.e.*, costs for which critical habitat designation is *not* a but-for cause). *See Ariz. Cattle Growers*, 606 F.3d at 1173.

The district court in *Arizona Cattle Growers* also observed that, "[w]here a [*New Mexico Cattle Growers*] approach is taken, the Service goes beyond the command of the ESA by examining impacts that exist independent of the critical habitat designation." *See Ariz. Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1035 (D. Ariz. 2008).

Similarly, the district court in *Fisher v. Salazar*, 656 F. Supp. 2d 1357 (N.D. Fla. 2009), stated that "[c]osts that exist independently of the critical habitat designation cannot be costs 'of specifying any particular area as critical habitat,'" and that, "[t]o the extent the Tenth Circuit's . . . approach permits consideration of costs not attributable to the

designation, it is inconsistent with the mandate of the ESA." *Id.* at 1371.

Further, the district court in *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006), noted that it was "not persuaded by the reasoning of *New Mexico Cattle Growers*," which it equated with the proposition that "the Service must consider *all* impacts of a critical habitat designation, including coextensive impacts." *Id.* at 1152 (emphasis added).

Finally, the D.C. District Court held in *Cape Hatteras Preservation Alliance v. United States Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), that the ESA does not mandate that "the Service must consider *all* impacts," for the "Service . . . must not allow the costs below the baseline to influence its decision to designate or not designate areas as critical habitat." *Id.* at 129-30 (emphasis added).

As is evident, none of these decisions employs the Service's "no connection at all" rationale, by which the Service tries to reconcile *New Mexico Cattle Growers* with the decision below. The absence of support confirms both the implausibility of the Service's reading, as well as the correctness of Petitioners' contention that the panel decision below, along with *Arizona Cattle Growers*, conflicts with *New Mexico Cattle Growers*.

B. *New Mexico Cattle Growers* Has Not Been Undercut by Subsequent Regulatory or Case Law Developments

Defendant-Intervenors, for their part, argue that there is no conflict because *New Mexico Cattle Growers* is defunct. Specifically, Defendant-Intervenors contend that the Tenth Circuit's decision has become outmoded because it is based on the Service's "destruction or adverse modification" regulation, *see* 50 C.F.R. § 402.02, which was invalidated by the Ninth Circuit in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). *See* Def.-Int. Opp'n at 6-10.

Defendant-Intervenors reason that, because *Gifford Pinchot* rejected the Service's position that critical habitat has no impact, and because *New Mexico Cattle Growers* was based on that now rejected position, it follows that *New Mexico Cattle Growers* is no longer good law. *See* Def.-Int. Opp'n at 7-8. In that case, the Service had expressed its longstanding view that critical habitat provided little if any benefit to species and, consequently, was "unhelpful, duplicative, and unnecessary." *New Mexico Cattle Growers*, 248 F.3d at 1283. But the court's criticism of the Service must be taken in context. The court was explaining the origin of the Service's position that critical habitat designation produces *no* impact. Yet the legal error in the Service's practice of assessing only those economic impacts for which critical habitat was a but-for cause was *not* the result of the Service's position that critical habitat fails to foster recovery, the issue in *Gifford Pinchot*. Rather, *New Mexico Cattle Growers* overturned the Service's wholly distinct position that,

because many if not all direct impacts of critical habitat designation can also be traced to the species's listing, the Service need not assess *any* of those impacts when designating critical habitat. *See id.* at 1283-84. The range of costs attributable to critical habitat designation has little to do with whether and how such designation should foster a species's recovery.

Because the Service's definition of "destruction or adverse modification" required an appreciable diminishment of critical habitat's survival *and* recovery components (not just a diminishment in recovery potential), *Gifford Pinchot* concluded that the definition was inconsistent with the ESA-mandated recovery goals of critical habitat. *See* 378 F.3d at 1069-70. Nothing in that holding is inconsistent with the rule announced in *New Mexico Cattle Growers*. In following *Gifford Pinchot*, the Service must take recovery into account when assessing the benefits of critical habitat designation. In following *New Mexico Cattle Growers*, the Service cannot ignore certain impacts of critical habitat designation simply because the designation is not a but-for cause of those impacts. *Gifford Pinchot* speaks to the "benefits" side of the critical habitat ledger; *New Mexico Cattle Growers* to the "costs" side. There is no inconsistency between the two cases. Consequently, *New Mexico Cattle Growers* remains good law, and the split between the Ninth and Tenth Circuits still exists.

II

THE NINTH CIRCUIT'S DECISION WILL HAVE A SIGNIFICANT NATIONWIDE IMPACT

Petitioners explained in their writ petition how the Ninth Circuit's decision and the rule it adopts will have national impact, and how that impact will be significant. *See* Pet. at 12-20. The Service and Defendant-Intervenors, by their silence, apparently concede that the decision will be "nationalized." Yet with regard to the significant impact of that nationalization, the Service and Defendant-Intervenors respond that Petitioners' "policy disagreements" or "policy preference" over environmental regulation and the ESA are not of this Court's concern. *See* Serv. Opp'n at 11; Def.-Int. Opp'n at 13. Those contentions are only partly correct.

Petitioners do not contend that the Ninth Circuit's decision is legally wrong because it will have bad results. Rather, Petitioners contend that review in this Court is proper in part because the decision below is wrong on the law in a way that will have profound and negative impacts on land-use and economic activity throughout the country. Those impacts support review of the decision in this Court. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies*, 498 U.S. 211, 214 (1991) (observing that certiorari was merited "in light of the economic interests at stake" in a legal dispute over "the national market for natural gas"). *See also Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (fact that lower court decision would create additional Social Security costs of $80 billion relevant to grant of certiorari); *Comm'r v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151

n.5 (1977) (fact that dispute concerned more than $100 million relevant to grant of certiorari), *cited in* Gressman, *supra*, at 269.

III

THE CUMULATIVE ECONOMIC IMPACT ISSUE IS PROPERLY BEFORE THIS COURT

Both the Service and Defendant-Intervenors make several arguments as to why the issue of cumulative economic impacts and critical habitat designation has not been properly presented.

The Service and Defendant-Intervenors argue that Petitioners contended below that *Arizona Cattle Growers* was consistent with their cumulative impacts argument. *See* Serv. Opp'n at 10-11; Def.-Int. Opp'n at 13-14. As noted above, the criticism misses the point. What matters is that the panel below *held* that Petitioners' argument (and the rule it advocates) is foreclosed by *Arizona Cattle Growers*, which itself expressly diverges from *New Mexico Cattle Growers*.

Defendant-Intervenors also contend that Petitioners did not brief the cumulative impacts issue, and that they are merely repackaging a separate and unsuccessful claim under the National Environmental Policy Act (NEPA). *See* Def.-Int. Br. at 14-15. Not so. Petitioners briefed the cumulative economic impacts issue: indeed, the fifth of their six issues on appeal was: "Whether the Service violated the ESA . . . by failing to assess the cumulative economic impact of the designation." Petitioners argued the issue. *See* Pet. App. A-18-A-19. And the panel below specifically addressed the issue. *See id.* at A-18-A-20. Petitioners did raise a NEPA claim and argued for their

cumulative impacts claim by analogy to NEPA because although NEPA does not mandate a cumulative impacts analysis, both the federal government and the courts have determined that an impacts analysis would not be complete without a consideration of the cumulative effects of the federal action. *See* Pet. App. A-19; Serv. Opp'n at 6. But Petitioners always treated the two claims as distinct.

Both the Service and Defendant-Intervenors castigate Petitioners for not citing *New Mexico Cattle Growers* below. *See* Serv. Opp'n at 8-9; Def.-Int. Opp'n at 14. But they do not explain what the utility would have been of relying on a Tenth Circuit decision that had been expressly rejected by a Ninth Circuit decision, when litigating an appeal in the Ninth Circuit. To be sure, Petitioners attempted, unsuccessfully, to distinguish that adverse Ninth Circuit precedent (*Arizona Cattle Growers*). But Petitioners are not now arguing that their view of the law was incorrect. Rather, they argue that their view of the law was *rejected* by the Ninth Circuit, and that the Ninth Circuit's *rejection* of Petitioners' view of the law has created a *conflict* with the Tenth Circuit.

Petitioners' cumulative impact claim is properly presented to this Court.

CONCLUSION

The Ninth Circuit's decision, which conflicts with a decision of the Tenth Circuit, will have a nationwide and severe impact which will be exacerbated in these difficult economic times. Petitioners' challenge to that

decision is properly presented. The petition should therefore be granted.

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Respectfully submitted,

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